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THE PRINCIPLES OF ZONING

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“The Legislative Department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”

James Madison, in The Federalist

No. XLVII, P. 343

Mr. Chairman and Gentlemen of the Forum:

I respond with pleasure to the request to explain the Principles of Zoning for many reasons. It is an honor because the subject is difficult. Zoning touches on life in many ways, constitutionally, legislatively, economically, socially. It is not possible to study all the laws that impend. When I read in the papers that there were 14,000 bills presented to the last Congress, I am reminded of the sentiment of Tacitus, spoken of the reign of one of the Emperors. "As formerly we were plagued by wickedness, so now by laws."* Tacitus was speaking particularly of the *Lex Julia et Papia Poppaea*, a drastic law against bachelors, such as has been actively urged in France, and talked of here. So let the Juniors of our Chapter beware and not delay too long. People accept whatever laws are passed in a passive optimism, like that of the old darkey in the days of the Civil Rights Bill, who said he "didn't know what there was in dat ar bill, but if there war any provisions in it he sho' wanted 'em."

But there is another reason why the subject demands attention. Professor Arthur Hadley says in his *Economics* (page 18):

"The advantages of intervention on the part of a government are visible and tangible facts; the evil that results from such intervention is much more indirect and can only be appreciated after close and intensive study."

A Zoning Ordinance is an ordinance which divides a municipality into various districts or zones and regulates

**Ut olim flagitiis, sic nunc legibus laboramus. Tac. Annals, III. 25.*

in those zones the location, size and use of buildings. In order to explain this in detail, I will analyze the Philadelphia Ordinance, which was presented to the City Councils about a year ago.*

DESCRIPTION OF THE PHILADELPHIA ORDINANCE

The Ordinance was presented under section 9 of Article II, the Act of Assembly approved June 25, 1919, entitled "An Act for the better government of cities of the first class in this Commonwealth." (P. L. 581.) It provided that, "for the purpose of promoting the public health, safety, order and general welfare," any such city may regulate the location, size and use of buildings therein, and may make different regulations for different districts thereof.

The Ordinance divided the City into three kinds of Districts; Use Districts, Height Districts, and Area Districts. These districts were shown by certain maps, and were not described by meets and bounds. The maps were sixty-three in number, and the districts of various kinds were not coterminous with each other.

USE DISTRICTS

Use Districts were graded into Residential, Commercial, Industrial and Least Restricted or "nuisance" districts.

In Residential Districts there were only to be dwellings, professional offices, etc., and certain other buildings by special permit of the Zoning Commission.

Commercial Districts were for general business and light industry.

Industrial Districts were for manufactories and trades.

*A more detailed analysis with sundry comments will be found in the Appendix hereto.

The Least Restricted Districts were to include the obnoxious manufactories, such as stockyards, etc.

No dwellings were to be allowed in the last named district.

No occupation, not even teaching school in one's house, could be carried on in the Residential District without a permit. No new stores were to be allowed, but if a store was already established it was allowed to continue under certain restrictions, such a store being thereby granted a sort of monopoly. By this the value of all of the other properties in the district would be, naturally, diminished for the benefit of the store, they being tributary to it.

HEIGHT DISTRICTS

The Height Districts were five in number. In them the height of a building on the building line was limited to certain proportions of the width of the street, namely, 1 Time, 1½ Times, 2 Times, 2½ Times and 3 Times. An additional height was allowed according to the setback from the street line. An absolute limitation was put upon all buildings in the respective districts, varying from forty-five feet in the 1 Time District to one hundred and fifty feet in the 3 Times District.

By these regulations some part of the value of unimproved real estate would be necessarily transferred to other improved property in the neighborhood.

It is the assumption of the Ordinance that high buildings are a detriment. No note is taken of the fact that for modern business they have become a necessity, and that for health they are much better than the old-fashioned buildings.

AREA DISTRICTS

Area Districts were to be five in number, classified according to the area of the lot which might be incum-

bered by buildings, varying from thirty per cent. to ninety-five per cent. By this restriction a large part of the value of many pieces of land would be taken away. Indeed it is evident that in each of the three classes of restriction, Use, Height and Area, a very considerable portion of the value of property is either transferred to neighbors, or to the public, or destroyed.

It is the assumption of the advocates of zoning that this value goes to the public, and that it should go to the public without compensation to the owners.

In order to enforce the system Zoning certificates and permits were to be required. The number which would have been immediately required, had the Ordinance gone into effect, was many thousands.

Violations of the Ordinance were to be punished by severe penalties. The Ordinance was to be carried out by a Zoning Division, organized as a part of the Department of Public Works.

Alteration of the restrictions to which any property was subjected could only be made by the Zoning Commission with the approval of City Council.

DIFFERENCE BETWEEN GENERAL LAWS AND ZONING

The fundamental novelty of the Zoning Ordinance is that the control of the use of real property is transferred into the hands of an appointed commission, which is *empowered to make, change and enforce enactments special to each district* affecting every piece of real estate in the community. Heretofore we have been governed by general laws. General laws are the index of a free and advanced civilization. Particular judgments are characteristic of primitive conditions. They were sustained in early days by the belief that they were inspired by a divine afflatus at the time of judgment. The theory

of this divine afflatus is not impressive in the case of political commissions. The advantages of general laws are: Fairness in application and in enforcement. By them a man can lay his plans and be advised by counsel of the rights on which he may rely. A modern state is founded on justice, and justice consists in generality and uniformity.*

This important distinction is overlooked by the advocates of Zoning. It has been stated that Zoning in Philadelphia began in 1855 in the Act of Assembly which provided that every dwelling should have an open space attached equal to at least twelve feet square.† But as this Act governed all buildings in Philadelphia there was no such thing as a “zone” connected with it. I may interject at this point that the proper way to increase the comfort and sanitation of dwellings is by a gradual improvement of the building laws. The requirement of 144 square feet might well have been increased long ago, and the exception that a tenement on a lot bounded by three streets may be erected to cover the whole lot,‡ might well have been removed. But the principal fault is not in the sanitary laws as drawn, but in the administration of them. We all know that the laws as to underdraining are not enforced. If politics has any influence now what would it be if every use is drawn into its meshes?

PRINCIPLES OF ZONING

From the above, we are able to formulate the principles on which the Zoning Ordinance is based. They are:

First.—That the kind of use of every man’s property should be controlled by a central authority.

*“Political Ethics,” Francis Lieber, page 185.

†Act of April 21, 1855. Re-enacted in Act of May 5, 1899.

‡Act of June 5, 1895, Section 2.

Second.—That this authority should be an Administrative Commission and not a Judicial Body.

Third.—That this Commission should be a politically appointed body.

Fourth.—That the damage inflicted on property by the Zoning restrictions goes to the benefit of the general public.

Fifth.—That this deprivation of right is justifiable as an exercise of the Police power.

Sixth.—That therefore the public can take away the rights of the individual without compensation.

These principles are new to America and the burden is on their proponents to demonstrate them. In view of their importance they should not be taken for granted but should be clearly proven.

ARE THE PRINCIPLES OF ZONING ESTABLISHED BY EXPERIENCE?

First.—As to our own experience, let us ask ourselves whether the way in which our municipalities manage their own property enlists our confidence in their ability to plan for all the property in a city in which there are some 500,000 buildings.*

Has the management of gas or of transit or of water or of markets or of housing filled us with such admiration of their care or judgment or prudence or business sagacity that we are willing to tie our own property to their judgment and allow them permanently to fix its status?

But still more, are we ready to abide by the decision of an appointed Commission which in the beginning has allowed the detail to be decided by a few men whose con-

*There were in 1920, 453,747. Philadelphia Year Book for 1920, page 33.

clusions were not unanimous, whose first judgment has already been repudiated, and whose second plan arbitrarily varies from their first?

A BUREAUCRATIC METHOD—NOT A JUDICIAL ONE

Second.—It is to be especially remembered that the decisions of the Zoning Commission are not reached by a judicial process. It is an administrative method, subject to all of the limitations and uncertainties of bureaucracy, and the ultimate decision is with Council, a political body. The advantages to the citizens of legal procedure are many. A suit at law is tried before a qualified judge, under a judicial oath, with a regular procedure, in open court, under uniform principles providing an equal law for all. The decision is subject to review by a competent authority. There is a record of the judgment and the reasons therefor; the judicial method therefore produces a greater respect among the people and a wider obedience to the law.

It is said, however, in justification of Zoning, that litigation is slow and expensive, and should be superseded by the quicker method of official administration. It is true that litigation is unpleasant, but self-defence is the price of liberty. A free citizen is one who knows his rights, and knowing dares maintain. His suit is between two citizens with equal chances of justice. In a method of bureaucratic administration the field of litigation is shifted. The suit is then brought by a citizen against an arm of the government with unequal chances of justice. If such a system should reduce litigation it would do so only at the expense of individual initiative and the manhood of the citizen.

The Zoning propaganda is symptomatic of a great reaction. Many Americans are growing tired of the

moral responsibilities of freedom, of the respect for others' rights and the vindication of their own. Weary they wish to lean against the State. Their mood is like that of Israel in the days of Samuel. They are turning away from the theocracy of liberty, which brought them out of their tribulations, and are beseeching the prophets of welfare to give them an absolute government like other nations.* If the parallel is completed the sequence will be a history of oppression.

WHAT ABOUT POLITICS?

Third.—But the Commission itself is a political body and as well as the Division of the Bureau of Surveys, subject to appointment by the Mayor. Whether politics ever has or could have in our City anything to do with licenses and permits or other papers issuing from City Hall, I leave to the judgment of those more experienced.

But it is evident that apart from politics, individual judgment, not to say caprice, may withhold or delay a license. I suppose we have all heard of inspectors of particularly characteristic views who have their own ideas about doorways, or fire escapes, fire towers, English villages, etc.

WHAT BECOMES OF THE VALUE TAKEN?

Fourth.—The next underlying assumption of Zoning is that the value which is taken from property owners goes to the benefit of the general public. This is unproved and in part is evidently untrue. For, in the first place, it is quite possible to destroy value without transferring it to anyone. If, for instance, a larger area is allocated to the Least Restricted District than is or will be required for objectionable businesses, the value of the property is taken away without anyone being benefited,

*I Samuel, VII, 5.

and if a greater area is allocated to a residence section than is required, a similar result follows.

It is frequently said that Zoning stabilizes values and as frequently is the case, a vast and unreliable assumption lies hid under a catch phrase. Whether prices are raised or depressed depends upon the law of supply and demand. If you allocate more than there is demand for, prices will tend to fall, for the taxpayer has no use for the property unless he tempts a buyer. On the other hand, if a less area is allocated than there is demand for, prices will tend to rise until the point is reached when improvements of the particular kind will be forced away from the city. In neither of these cases are values stabilized. But what body of men has the prescience as well as the omniscience to know what area is or will be necessary for all possible trades in a region such as Philadelphia, which as a manufacturing district is in competition with fifty miles of river front?

For similar reasons, if one district is degraded by a restricted use, the real estate therein already occupied by dwellings is depressed and part of its value is taken away and added to the more favored areas.

Where building heights are suddenly restricted, the value of a certain property which has increased on account of its availability for a high building is taken away and is added to the high buildings already erected in that locality with which it would compete and which are therefore given an additional value by reason of a *quasi* monopoly.

It is proposed that this be done even after the potential value of the unimproved sites has been recognized by the City by increased taxation. In such case the City deprives the property of a use for which the City has already been receiving payments.

It shows the effect of assertion accepted without analysis that many people think such a Zoning Ordinance will help the poor, and in fact the Philadelphia Housing Association, with whose aims I have the greatest sympathy, has actually urged the passage of the Ordinance. But the middle and poorer classes are excluded from the Least Restricted Zone by the prohibition of the Ordinance and are precluded from the most favored zone by the expense. They are forced, therefore, into the Commercial and Industrial Areas. This congestion tends to augment rents, diminish repairs, and raise values in those districts. The only class which is really favored is the wealthy class, which is protected from the incursion of the poor, so that *the Ordinance really tends to stabilize the values of the rich at the expense of the poor*. As the natural sequence is less improved houses in bad places and higher rents in favored localities, the next step in our present legislative temper will be various laws to restrict rents, our legislatures being now continuously employed in endeavoring to pull down with one hand what they have erected with the other. Let us beware of what is called a poor man's law—it may turn out to be a rich man's law; but in this country we want no poor man's law and no rich man's law, but only every man's law.

It must not be thought that the injustice is done once for all when a Zoning Ordinance is adopted, for every considerable change thereafter has a similar train of consequences. This is now being found in Boston, where there has been a limitation on the height of buildings since 1891. An agitation has now been started there to increase the height allowed. As is very natural, owners who have already built up to the old limit of 125 feet, “object to an extension of the limit because when they built they were restricted in the use of their land by the

State acting under the police power. They received no compensation for such restriction except *the assurance that their neighbors would be similarly restricted*, and if the restrictions are now relaxed they are put to a disadvantage.’’*

POLICE POWER A VERY HANDY TERM

Fifth.—Nevertheless, this spoliation of value and this distribution thereof among the wealthier classes is termed an exercise of the police power. I shall presently recur to the meaning of this term. For the present, it is sufficient to say that it has been inordinately expanded from meaning such exercise of the power of the State as is necessary to protect the health and life and property of owners to any arbitrary exercise of power alleged but not proved to enhance the public welfare.

A PHRASE INSTEAD OF JUSTICE

Sixth.—Having alleged that zoning is a proper exercise of the police power, the proponents carry over with that doctrine the corollary that property taken under the police power is not subject to compensation. Now, this has been decided as to objects clearly within the police power but to extend it to embrace all damage inflicted by any ordinance stated to be for the general welfare is to introduce a destructive socialistic program under the terms of constitutionalism.

HISTORIC EXAMPLES OF ZONING

Zoning is promulgated on the example of German cities, but it is not peculiar to Germany. Many medieval and tyrannical governments indulged in it. Germany has in this, as in other things, put an autocratic anachronism into modern dress.

*See Report of the City Committee on Height of Buildings made to the Directors of the Boston Real Estate Exchange, March 6, 1923.

Before speaking particularly of Germany let us look at an example or two of English Zoning. "London in 1629 had improved in wealth and grandeur. The gay appearance of the goldsmiths' shops, shining with bur-nished plate in Goldsmiths' Row in Cheapside was thought very grand." I am quoting from Macpherson's Anderson's Annals of Commerce. So in 1637 King Charles, "who delighted too much in copying after any arbitrary order of other nations, commanded all the silversmiths to live in Goldsmiths' Row. The cruelty and absurdity of this order is so obvious to everyone," says the judicious Annalist, "that it is needless to make any further comment on it. Possibly such as were to be indulged in this case paid sufficiently for it."*

It is interesting to observe similar attempts in the other departments of Zoning. The same King, in 1630, issued a proclamation against erecting houses on new foundations within three miles of any of the gates of London, or of the Palace of Westminster; also against entertaining inmates of houses there, "which would multiply the inhabitants to such an excessive number that they could neither be governed nor fed." This followed an earlier proclamation of James I, (1618) in which the provision was for two miles only, but James only followed an earlier proclamation of Elizabeth, (1602) which followed an earlier one of 1593, which followed an earlier one of 1580, wherein the limitation was three miles. Speaking of the proclamation of 1602, Macpherson (1805) says it was issued, "after the unaccountable humor of that age, in foreseeing dangers that never yet happened, nor are ever like to happen from an increase in the suburbs of London."

*"Annals of Commerce," Vol. II, page 401.

Of course, these gestures of the land owners were impotent against the economic trend. The population of London was, in 1590, say 150,000 to 160,000.*

The high watermark of medieval zoning was the Ghetto. It is not likely to be urged in this country for the Jews for they are active and wealthy. But how about the Negroes? It would certainly "stabilize property" to have a Jim Crow Zone. The Constitutional Amendment need not stand in the way. No Constitutional Amendment has the respect which was formerly accorded it. The Thirteenth is a dead letter in many places; the Eighteenth in many other places; if the Fourteenth does not protect property how long will it protect person?

GERMAN POLICY DISCUSSED

Modern Zoning was gradually developed in German cities in the latter part of the last century, but was not fully established until the last fifteen or twenty years thereof.

Even in Germany it has had scarcely time enough to demonstrate its economic effects.

There are several reasons why what is applicable in Germany is not so in America.

It will help to understand the contrast between the administration of German cities and of American if we call to mind a few of the facts relating to municipal life in Germany. I will quote the facts from "Municipal Life and Government in Germany" by William H. Dawson (Second Edition, 1916).† This book was written just

*See "Macpherson's Annals of Commerce," Vol. 1, 195; Vol. 2, 166, 202, 227 and 364.

†See also "Bismark and State Socialism," Dawson, 1891.

"Socialized Germany," Frederick C. Howe, 1915.

For an abstract of the underlying philosophy see "Germany and England," J. A. Cramb, 1914.

For a general account, "Germany and the Germans," Collier, 1914.

before the war largely to show the British public how much better municipal regulation was in Germany than in England.

Recollect, then, that the German cities have an early tradition of self-government and are many of them older than the State. Three of them, Hamburg, Bremen and Lübeck, are still free cities (unless their status has been changed since the inauguration of the republic).

“By the traditions of German cities, the civic tie was frequently stronger than the national.”*

When absolutism was in vogue in Europe, the city managed its citizens, “in the best manner of the autocratic overlord” (page 8). The Council of Hamburg issued a proclamation in 1602 affirming, “If a government should be lordly, godless, tyrannical and covetous, the subjects have still no right to resist; they should rather regard such a condition as a punishment of the Almighty visited upon them for their sins.”

When Napoleon entered the country, he was obediently received by State Officials and military officers, “so lightly,” says Dawson, “may the sentiment of loyalty hold and compel an overdisciplined people” (page 13).

Even the reform of the city governments of Germany introduced by Stein was given to the nation from above. “In truth,” says Dawson, “Stein wished to create an effective system of self-government as much for the sake of the State as in the interests of the people who were henceforth to manage their own affairs.”

The Municipal Ordinance of 1808 provided that the Town Counsellors as a whole should control the entire administration of the municipality in all its branches (page 19). The chief mayors of the large towns were to

*Dawson, page 1 to 3.

be nominated by the Crown from lists presented by the towns (page 20).

German towns may in general enter upon any trading enterprise to any extent (page 25) and there is no limit to their general administrative powers (pages 30, 32).

In addition to that, the German Municipal System is unified. There is only one taxing authority and the same authority administers education, poor relief, city planning, roads, art, learning, music, drama and social welfare (page 33). Most of the larger towns carry on savings banks, finance societies, mortgage banks, labor registries, house building, unemployment insurance, fire insurance, etc., as well as sundry trades hereinafter mentioned.

Wide powers of supervision and control are exercised by the State and justified on the theory that all local government is a devolution of State function and authority.

It was natural under such a theory that the police power should be greatly expanded. By the old law of Prussia, "it is the office of the police to provide the measures necessary to maintain public peace, security and order and to avert danger threatening the public or individuals. The State reserved the power to establish its own police directions in the towns and to transfer the exercise of police functions to the Legislature, which will then exercise the same in commission. "In this capacity, the magistracies shall be regarded as State authorities." This provision is still in force in Prussia. The Mayor in the German city, therefore, is not only the head of the town but he is the agent of the State (page 42). The State exercises a similar control over education and no one can teach in Prussia without a license (page 44).

Under the above system, one sees exercised from day to day and from hour to hour powers for which there is

no specific legal sanction. To state the whole situation in a sentence we may use the words of a German writer quoted by Dawson: "Like the absolute city of old, the modern towns are conscious of the will and power to advance and direct the entire social life of their citizens."*

There is another important point in which German cities differ from American and that is the right of suffrage. The usual qualification in Prussia is the ownership of a dwelling house in the commune, assessment to State income tax or carrying on an independent business, etc., all of these conditions implying liability to pay local taxation. A term of residence is also prescribed, varying from one year to twenty-six (page 65). Among the disqualifications may be mentioned the refusal to undertake honorary civil office when required, etc.

German towns are as a rule largely governed by permanent officials (page 77), and the executives of most large towns are frequently men of ripe experience, business training, practical judgment, and sometimes ample leisure (page 78). In the administrative staffs the higher appointments are frequently life appointments (page 99), and administrative positions are much desired (page 100).

German towns by long tradition generally own a considerable portion of the land within their administrative areas. The proportion of the number of acres owned by the towns to one thousand inhabitants varies in the principal cities from twenty-one in Munich to nine hundred and three in Görlitz, and the percentage of land owned varies in some of the towns from twenty per cent. to seventy-seven per cent. (page 108, etc.)

Berlin owns a total of 52,000 acres in and outside of the administrative area, and many towns make large gains

*Philip Stein, cited in Dawson, page 51.

from their systematic trading in land (page 116). They sell public land for housing schemes.

From the ownership of land follows the necessity of town planning. "Thus," says Dawson, "the *newer** town plans invariably set apart a set area for industry. As the towns own the land, no set legislation has been needed in order to enable them to carry out such plans."

The old common law of Prussia of 1794 contains the provision that buildings which spoil the appearance of a public place may be prohibited by the police authority, charged with the regulation of building, and this authority can require the removal of any erection that is offensive to the eye (page 132). Since then, the building authorities in Prussia are empowered to refuse sanction to the erection of buildings that would disfigure important streets.

In these provisions we see the origin of such bodies as Art Juries, which though extralegal to our system have been transplanted to our own city.

Many Prussian towns go even so far as to give advice to architects (page 133)!

It was natural for German policy to develop housing policies, but apparently these policies have not been as successful as we are sometimes told. I quote from Dawson as follows:

"A well-known German housing reformer, Dr. Stüb-
ben of Berlin, said recently, 'The price which we pay in
Germany for the possession of the best planned towns
in the world is the destruction of the home. High
prices of land, high rents and high taxes prevent the
building of small houses and lead to the erection of huge
barracks, with the result that the workman, like many

*Italics are my own.

others, seeks recreation not in his home, but in the public house'' (page 139).

''In the Rhineland there are found, owing to perverse building regulations, made to satisfy the requirements of building speculators, narrow courtyards without air or sun, frightful ventilation shafts, the ever dark landings, semi-dark rooms and other defects which are a parody on the simplest requirements of hygiene.''

''It is indeed,''' says Dawson, ''no exaggeration to say that after allowing for much common exemplary building, housing conditions are nowhere so bad with so little justification as in many of the newer industrial towns of Germany.''

The most notorious home of the barrack house is Berlin. The average number of persons per inhabited house in that city is seventy-seven. Some of the larger cities rank down to twenty and the Berlin average is kept down by the relatively small average prevalent in the well-to-do districts of the West, where whole districts have an average no higher than twenty-six. Half the dwellings of Berlin contain only one room and a kitchen. Thirty-three thousand of these dwellings have only one heatable room and twenty-four hundred have no such room at all, and four thousand and ninety dwellings consist simply of a kitchen (page 141).

It was said that the great barrack house owed its existence to accident and thoughtlessness. Does it not seem strange that either of these could occur in ''efficient, wonderful Germany''? But there, as everywhere, the principles applied by reformers are too often governed by fad and caprice. Wide streets were laid out, too wide for their business, and the flat house became an obsession (page 142).

Nor has the German system produced a house-owning population. It is estimated that in Berlin ninety-seven per cent. live in rented houses, in Hamburg ninety-four, and in other large cities also high percentages (page 144).

It is natural that under these conditions rents should rise in Germany. Before the war, house rents in Berlin was reckoned at thirty to fifty per cent. higher than in London.

NOTE: It may be interesting to compare the statistics of Philadelphia with those of Berlin. The following is a table of home ownership in Philadelphia, furnished by the Philadelphia Housing Association in the book prepared by Bernard J. Newman:

<i>Year</i>	<i>Total Houses</i>	<i>Per Cent. Rented</i>	<i>Per Cent. Owned by Occupant</i>	<i>Per Cent. Owned Free</i>	<i>Per Cent. Owned Mortgaged</i>
1900	265,880	77.9	22.1	54.7	45.3
1910	327,263	73.4	26.6	43.7	56.3
1920	402,946	60.5	39.5	29.8	70.2

From the above it will be seen that in twenty years the percentage of rented houses has fallen from 77.9 per cent. to 60.5 per cent. and the percentage of houses owned by the occupant has increased from 22.1 to 39.5 per cent.

Taking the number of houses in Philadelphia in 1920 at 402,946 and the population by the United States Census of 1920 at 1,823,779, it makes an average of 4.5 persons to a house, as compared with 77 in Berlin. See "Housing in Philadelphia, page 33 (1921). The figures in the above table reflect war conditions.

How is such a condition to be remedied?

"Important legislation," says Dawson, "will admittedly be necessary before the question is done with, but in the meantime local authorities are doing their best with the powers at their disposal. In many towns the old slums have been cleared away wholesale at enormous expense. Hamburg has expended several million pounds in this way, and 'costly clearances' have been made in other cities, but in Germany as everywhere,

the displacement of population under such circumstances creates the problem of its future housing.''*

Lord Roseberry in a speech at Shoreditch, at the ceremony of the opening of the Workmen's Homes, is quoted as saying:

“You have lodged three hundred families, but you have dislodged many more. That seems to me a droll way to house the poor.”†

Of course, such conditions stimulated a paternal municipal management to build houses. Over forty-two of the larger cities have done so, but as usual, a too benevolent policy meets with its drawbacks (page 150). Freiburg began in 1862 by building houses to sell at cost. Of course, it was found immediately that the new owners were selling out at a profit.

But the German cities not only engage in house building, but in any kind of business in accordance with the old German tradition. Communal corn, wine and fruit businesses, dairy farms and other collective enterprises still remain from the earlier centuries.

Prussian towns now not only engage in water works, gas works, tramways, abattoirs, docks, markets and bathing establishments, but in quarries, breweries, inns, factories, bakeries, mines, brickmaking, mills, dance halls, fisheries, etc., etc. So common is it that of 1279 towns, only 310 small villages are or were without trading enterprises (page 184).

I have dwelt on the condition of the German cities because they have been heralded again and again as examples of a highly socialistic government uniformly successful in its undertakings, especially in housing.

*Italics are my own.

†Guyot's “Where and Why Public Ownership Has Failed,” page 160.

HOW AMERICAN CITIES DIFFER FROM GERMAN

Let us now contrast the situation of American cities.

First.—Constitutionally, the American city is not a social entity of its own, but is a mere arm of the State for the government of a locality.

Second.—It is therefore limited as to its function and when any business is undertaken the enterprise must be justified by an enabling act. For this reason, American cities are untried and untrained in business and in what they have undertaken have not as a rule been successful.

Third.—American cities are limited much more strictly as to the debt which they can create than German cities. German cities have issued many municipal obligations which are regularly quoted two or three per cent. below State securities giving a corresponding interest.*

Fourth.—American cities being the creature of the legislature, their charters are subject to repeal or alteration by the legislature, as has been done in greater or less degree by what are known as “Ripper Bills.”

Fifth.—For the above reasons, the policies of American cities are vacillating and uncertain in business matters, and various questions are submitted to public vote which are not suitable therefor. At one time a city will own its own gas works, at another time it will lease it, and important business questions remain unsettled for long periods.

Sixth.—American cities are governed by divided authority, the mayor or executive being distinct from the Councils or Legislature, and as they are frequently of different political parties, no consistent policy can be carried out.

*Dawson, page 299.

Seventh.—The executives of American cities are elected for short periods, and are frequently not eligible for re-election, so that no sufficient time is allowed to develop a particular policy and there is no certainty if it is developed that it will not be reversed.

Eighth.—The administration of American cities is so environed by politics that a business question is not always considered on its merits.

WHY FOREIGN LAWS ARE UNSUITABLE

The reason why it is dangerous to transfer a law or part of a policy from one country to another is, that there are often implications embodied in the law not immediately obvious. The danger of transferring a law not justified by the customs of the soil to which it comes are well stated by Robert Flint, in the course of his analysis of Montesquieu's Legislative Doctrine. "It was of the very essence of his (Montesquieu's) Juridical and Political Doctrine, that positive institutions and laws are far more the effects of a nation's character than its causes, and that it is vain to expect any good from transplanting the laws and institutions of one nation to another differing from it in race, mental and moral qualities, historical antecedents and physical conditions."*

STATIC AND DYNAMIC SOCIALISM

I have shown that the Ordinance is socialistic in that it takes private property without compensation, but it is purely negative and restrictive in its action. The German cities are actively socialistic, with land and power and a program. We are, therefore, transplanting

*Robert Flint "Historical Philosophy in France, 1894," page 274.

See also Bagehot Letters on the *Coup d'Etat*.

an exotic plant to an unfruitful field. We are taking only that element of socialism which depresses and kills. It is static and not dynamic socialism.

From the above it is evident that we have no experience of our own to guide us and that the experience of German cities is not applicable to us. It remains to consider whether Zoning is justifiable upon theory.

Let us first consider

LEGISLATIVE THEORY IN AMERICA

By theory is not meant a mere hypothesis to explain the movement of legislation. The word is used to denote that collection of concordant principles demonstrated by history, commended by experience, approved by justice, intentionally adopted in our Federal and State Constitutions, and made the basis and guide of our legislative system. They include both principles of justice, which are fundamental, and principles of government which are administrative. I shall only allude to two or three of the most obvious.

PROPERTY NOT TO BE TAKEN WITHOUT COMPENSATION

First.—Those protecting liberty of person and property.

“No person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.”*

It is quite true that the first eight amendments to the Federal Constitution are not intended as limitations upon the powers of the State Legislatures, and apply to the Federal Legislature;† but the same principles are

*Constitution of the United States, Fifth Amendment (1789).

†See cases cited in Purdon's Digest, page 72.

incorporated in the constitutions of the different States in various verbiage. In Pennsylvania they appear as follows:

“All men * * * have certain inherent and inalienable rights among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.”*

“Nor can (the accused) be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land.”†

“Nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made and secured.”‡

These principles were neither novel nor experimental. They have been developed for the just guidance of mankind to an evolution of orderly government. They are a part of the moral necessity which doth “front the Universe with an invincible gesture,” and America may learn from the examples of history from Spain to Russia that no nation can violate them with impunity.

“Our destiny,” said George William Curtis, “is the utmost development of Liberty.”§

SEPARATION OF FUNCTIONS OF GOVERNMENT

Second.—In order to guard these principles American polity provides an important rule for the framework of government, namely, the separation of governmental power into three departments, Legislative, Executive and Judicial. This is not explicitly laid down in the Federal

*Constitution of Pennsylvania, Article I, Section 1.

†Article I, Section 9, Purdon’s Digest, page 122.

‡Article I, Section 10, Purdon’s Digest, page 128.

§Phi Beta Kappa Oration, 1862.

Constitution, as it has been in some of the State Constitutions,* but the Federal Constitution silently adopts it as evident and preaches it by example. As this principle is now being frequently disregarded to the insecurity of our rights and the decay of the Constitution it demands a little longer treatment.

The distinction between these Departments is elemental in free societies and comes down from Aristotle, the father of politics.†

“All States,” says he, “have three elements, and the good law-giver has to regard what is expedient for each State. When they are well-ordered the State is well-ordered, and as they differ from one another, constitutions differ. What is the element first which deliberates about public affairs; secondly, which is concerned with the magistrates and determines what they should be, over whom they should exercise authority and what should be the mode of electing them; and thirdly, which has judicial power?”

It was to this separation in the Government of England that the framers of our Constitution looked, especially as interpreted in Montesquieu’s “*Spirit of Laws*,” and in Locke, “*Of Civil Government*, Book II, Chaps. 9-13.” The reasons are stated in Montesquieu’s “*Spirit of Laws*,” Book XI, Chap. 6, “*Of the Constitution of England*,” as follows:

“The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man needs not be afraid of another.

*For the original states which had adopted it prior to 1787 see “*Federalist*” No. XLVI.

†Aristotle, *Politics* IV, 14-16, Jowett’s Translation, Vol. I, page 133.

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

“Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”

Madison, in the Federalist Nos. XLVI and XLVII, discusses this passage, showing that separation cannot and ought not to be absolute, but that the different departments ought to be so far, “connected and blended as to give to each a constitutional control over the others.” He there shows what we have now many examples of, namely, that the danger to the American State is from the Legislative Department.

Enough has been said to define the State contemplated by our Constitution. It is a State where equal and general law protects all alike, where the citizen living in a condition of domestic tranquility (Preamble of Constitution) has no occasion to entertain a mean fear of the malice of his neighbor or of the power of the State, for it is a country free from unreasonable searches and seizures (Fourth Amendment), from arbitrary arrests and excessive fines, from the petty interference of paternalism, and the mortal persecution of autocracy, where the laws are general, certain and known, where a citizen relying in confidence on the maintenance of judicial procedure and speedy and judicial trials, follows his own

vocation in his own way and in his own place as long as he injures no one else; where the free spirit of man is allowed its fullest play, and where liberty and order are secured in their mutual balance. This is the system to which we owe our happiness, and by which our greatness has been achieved. This liberty demands our reverence by the vastness of its ideal, our gratitude for its infinite benefit, our ready pardon for its errors, and above all unflagging and defiant enthusiasm, without which even liberty must die.

DANGER OF PRESENT TENDENCIES

I have insisted on the necessity of separation of government function, because it is in this respect that present tendencies are carrying us far away from the principles of the fathers. The country is now being governed by multitudes of departments and commissions which infringe this law in that *the same men or body of men have the right to make laws, interpret them and enforce them*. The most notorious example of this is, no doubt, the Internal Revenue Department, as it enforces the drastic income tax law. It interprets the law passed by Congress, passes a multitude of regulations which are in effect laws, changes them at pleasure, interprets them at will, almost uniformly against the taxpayer, and then enforces them by distress and heavy penalties. There is really no redress on the part of the subject (for such the former citizen may now be truly called), and the only judicial methods provided are inadequate and can be applied only after the harm is done. No general act applying to the whole country, since the Alien and Sedition laws, has probably done as much to make our citizens fear and dislike their government as the Internal Reve-

nue Act. But the same objection applies in a greater or less extent to many commissions.

The Interstate Commerce Commission is an example of one of the most oppressive of these. It is needless here to mention them all, nor would it be possible except after long study to make a complete record.

The situation as to Federal commissions has been summarized by Hon. A. O. Stanley, of Kentucky, a member of the House of Representatives, in a speech made in Chicago, January 12, 1922:

“In the ownership, operation, or supervision of the industrial and commercial activities of an empire, from telegraphs and telephones, steamships and railroads to the elimination of boll weevil and the setting of a hen, Congress has created 100 different committees and commissions, boards and bureaus, and within 10 years has actually expended the appalling sum of \$3,921,360,167.55, according to the official figures of these departments. If, however, the more dependable estimates of that able and accurate statesman, Senator King, of Utah, are accepted, it reaches the incomprehensible aggregate of \$7,500,000,000.”

There is a similar condition in State administration. The Reorganization Committee found the State administration of Pennsylvania divided into 107 independent agencies, including 8 constitutional officers. These agencies were made up of 25 administrative departments, 2 independent bureaus, 14 independent boards, 2 councils, 12 unattached boards in charge of licensing the various professions, and 42 independent commissions concerned with various matters from art to soldiers' bonus, as well as 10 miscellaneous groups of Boards and Agencies supervising charitable activities. As the laws creating these

commissions and defining the duties of the subjects are voluminous, complicated and difficult to understand, as well as frequently penal in their nature, the business man of the present day moves in a constant maze of perplexity and danger. The Zoning Laws are full of such traps for the unwary and as is the case in all such complicated laws, they will be used by the unscrupulous to the disadvantage of the honest.

Third.—A third principle of American policy is that

THE LEGISLATIVE POWER CANNOT BE DELEGATED

This, according to Locke, is one of the four fundamental bounds which the law of God and nature has set to the legislative power in all forms of government.*

It is the nature of every trust that the discretion conferred on one cannot be transferred to another. The provisions of our written constitutions expressly provide where the legislative power shall reside.†

Now it is true that a certain degree of latitude has been allowed by the legislatures to cities to pass regulative ordinances as, for instance, those imposing restrictions against wooden buildings, as a protection against fire, but in such cases the Legislature has at least exercised its discretion on a certain definite question affecting the life and safety of the citizens; but how different is the case of the Zoning Act. The entire discretion has been passed on to City Council in a mass to determine the use of any property, to classify business, to degrade certain trades into the class of nuisances, to prohibit legitimate

*Locke, Civil Government II, Chap. XI, Edition of 1823, Vol. V, page 423.

†Constitution of U. S. Art. I, Sec. 1, Purdon's Digest, I, 5, and cases cited.

Constitution of Penna. Art. II, Sec. 1, Purdon's Digest, I, 138 and cases cited.

business on one's own land, and in one's own home, irrespective of the manner in which it is conducted, and to grant or withhold licenses for each occupation. Such discretion involves the exercise of truly legislative power to a vast degree, and in arbitrary ways, which may ruin one man and set up another. But observe further, that although Council passes the Ordinance the work of actually dealing with the detailed discretion is handed over to an appointed Commission, separated by two removes from the legislative power. Even the Commission actually transfers the labor to a committee so that in fact a small body of men, thrice removed from the legislative power, without the support of any suffrage, or the responsibility of official oath, by such process as they may choose, either secret or open, are allowed to determine the status and the value of one-half of a million properties, and alter the rights and living conditions of two million people.

Let us contrast with our American principles

THE THEORY OF GOVERNMENT IN GERMANY

Its basis is military authority, unrestrained by any constitutional limitations. I will quote the highest authority:

“The German Empire, situated in the middle of Europe, and insufficiently protected by nature on its frontiers, is and must remain in a military state. And in history strong military states have always required monarchical guidance * * *. What we Germans need cannot be attained by alterations in the sphere of constitutional law * * *. For the most part the dictum of members of Parliament is accepted quite passively by the common herd.”*

*“Imperial Germany,” 1914, Prince von Beulow, 338-341.

We find, therefore, instead of the power of the government being the gift of a free people ascending upward, an imperial law descending downward, a system encouraging title and caste, rigidity instead of freedom, a supreme power which is not to be criticised without *lese majesté*, an idea of the State dominant over all as guardian, father, educator and God. Hegel, in whom is found the principal philosophic spring of modern Socialism in Germany, regards the State as the "eternal and necessary realization of the spirit of man; it is God come down to *us in the likeness of man.*"*

I will quote the analysis of this idea from a competent critic, Professor John A. W. Haas, President of Muhlenberg College, who said, in his Phi Beta Kappa Oration, March 1, 1918, "The peculiar German development has taken the State apart from the immediate interests of the people; it has created a divine organization on earth. Treitsche speaks of the objectively revealed Will of God in the life of the State, 'The State is made a real social personality in a political, legal and moral sense' * * *. Now all idealizations of the State are moral abstractions, but they become dangerous abstractions when men are asked to obey and reverence them * * *. We must be careful, in this age of increasing social tendencies not to allow any social abstraction to become the reality. Wherever that occurs the real ideals are injured, and the people for whom the State exists and who constitute society become the slaves of an abstraction, and an abstraction may become a terrible master."

To the German nation, therefore, a free political development has been impossible. "No people," says von Beulow, "has found it so difficult to attain solid and permanent political institutions," and again, "We are

*See "Philosophy of Political Economy," Bonar, 316-17.

not a political people.” “How can you wonder,” said Ministerial Director Althoff, to the Prince von Beulow, after reciting the enormous achievements of the Germans in other departments, “How can you wonder that we are political asses? There must be a weak point somewhere.”* “A German,” says the Prince in another place (page 154), “rarely applies the methods of modern science to politics, he mostly employs those of the old speculative philosophers. He does not attach importance to confronting nature with open eyes, and to observing what has happened, what is happening, and therefore what can and necessarily will happen again in the future. Rather he grows intent upon finding out how things ought to have developed, and what they ought to have been like for everything to harmonize with his logic, and for the system to come into its own. *Their programmes are not adapted to reality; reality is to adjust itself to the programmes.*”

The victims of such a system must be trained young. It is worth while to glance, for a moment, at a picture drawn by Goethe (1828), showing how the servitude of the German people begins in childhood. After speaking of the respect and freer development enjoyed by children in England, he says “In our own dear Weimar I need only look out at the window to discover how matters stand with us. Lately, when the snow was lying upon the ground, and my neighbor’s children were trying their little sledges in the street, the police was immediately at hand, and I saw the poor little things fly as quickly as they could. Now, when the spring sun tempts them from the houses, and they would like to play with their companions before the door, I see them always

*Imperial Germany, 127, 128, 131. Althoff spoke in jest; but the world fully agrees with him.

constrained, as if they were not safe, and feared the approach of some despot of the police. Not a boy may crack a whip, or sing or shout; the police is immediately at hand to forbid it. This has the effect with us all of taming youth prematurely, and of driving out all originality and all wildness, so that in the end nothing remains but the Philistine.”*

From this short review we see that German municipal policy is based on absolutist doctrine and autocratic practice in both nation and city, it is informed by a subtle, pervasive and anti-Christian philosophy, encouraged by civic tradition and imposed on a peculiarly docile and subservient population.

Let us not flatter ourselves that this “terrible master” may stretch his sceptre only over those who kneel at the foot of a throne. The tyranny of the majority operating in a legislative hall may grind a supposedly free people with oppressive laws, more hopelessly than in a monarchical country, for with the mob there is but fitful clemency and no appeal. The autocracy of the old world was denominated a “despotism tempered by assassination,” that of the socialistic world if consummated will be a despotism tempered by bribery;† we have had a sort of foretaste of this in the enforcement of the Eighteenth Amendment.

DANGER OF THE TERM “POLICE POWER”

To the unsophisticated mind to state the principles formerly dominant in American government and then to state the principles of Zoning is to show their inconsistency. The advocates of Zoning, however, allege that such a policy is by the decisions allowable under the police

*Eckermann & Soret, *Conversations of Goethe*, Vol. II, page 59.

†“Mitigated by tips” was the expression of Coventry Patmore.

power, and under the police power they endeavor to group not only whatever is in the interest of public peace, health, morals or safety, but, as they say, of the general welfare.

Now it is true that the Legislatures of the States have gone very far in passing acts supposed to be for the general welfare of the people and that the Supreme Court has in many cases refused to hold such acts unconstitutional on the ground that presumptively the Legislature was the proper judge of what was for the general welfare.

The advocates of Zoning go a step further and argue that because the Supreme Court has not declared certain acts unconstitutional therefore they must be beneficial, and then they add that, the necessary destruction of value which they cause, being under the police power, it is not requisite that the owner be compensated.

THE CASUISTRY OF SOCIALISM

The zoners utterly fail to distinguish between taking property under the power of eminent domain, and under the police power. The reason is that the powers are, in fact, indistinguishable, although the processes are different. "What then is the line of difference between these powers?" asks Mr. Frank Backus Williams, the legal protagonist of Zoning.* "The analysis of the cases," he answers, "*seems to show that it is largely one of degree.*" This is the same as saying that they are largely the same in kind, but injuries of the same kind are entitled to the same kind of redress. The distinction is, therefore, one of terms, and not of right, and justice is made to depend altogether on the term you use, and not on the wrong you do; and so the police power

*The Law of City Planning and Zoning (1922), page 25.

is made "a higher law than the Constitution," for the Constitution, like the Eighth Commandment, says nothing about powers, but "Thou shalt not take." What a hocus-pocus of law, whose seat in the days of Hooker was in the bosom of God!

PROTECTION OF THE POLICE POWER CANNOT BE WAIVED

Now it is very evident from this that if any and all property can be taken for the good of the public and the act under which it is taken denominated an exercise of the police power, that there is no such thing as security of property left. Every honest mind has an immediate and persistent doubt as to whether such an act as a Zoning Ordinance is really an exercise of police power, and that it is not in fact is shown with sufficient certainty by the conditions which are included in many of the ordinances, namely: *that the enforcement of the power is made to depend upon the consent of some of the property owners*. Many of the ordinances provide that a building obnoxious thereto can be erected in certain localities with the assent of a certain proportion of the property owners; the Philadelphia ordinance provided that petitions for change should be made in writing to the Commission by the registered owners of more than one-half of the frontage between two streets, but that if a protest was made in writing by one-third of the registered owners the appeal should not be granted except by a vote of three-fourths of the Zoning Commission. It is evident that if the restriction is necessary for the safety or health or even the general welfare of the body politic, it cannot be subject to the discretion of an uncertain number of individual citizens. The protection of the police power in its very nature cannot be waived. These provisions to the candid mind stamp the Zoning Ordinance not as an exercise of

police power but as an act regulating property rights. In fact, its advocates maintain the Zoning Ordinance on the ground that it stabilizes the value of property.*

CONSTITUTIONAL MORALITY

Long ago, Grote, the historian of Greece, introduced the term, "constitutional morality,"† by which he meant that self-restraint, which he describes as, "the indispensable condition of a government at once free and peaceable." Where the legislator votes for an act unconstitutional in spirit, either on the supposition that it may slip through the test of the courts, or on the ground that he will leave it to the courts to determine that it is unconstitutional, if it be so, he is guilty of an offence against the spirit of the constitution.

Solicitor General Beck has drawn a useful distinction between acts which are juridically unconstitutional and those which are politically anti-constitutional.

The fact that Zoning is anti-constitutional in this sense is readily inferred from the confessions of the professional zoners themselves. There has been created a Division of Building and Housing as part of the Federal Department of Commerce. What that Department has constitutionally to do with municipal regulation is nothing. It is created under the clause relating to Interstate Commerce, and Zoning is neither Interstate nor Commerce. An Advisory Committee on Zoning has been appointed, made up principally of professionals. It has issued a form of a State Zoning Enabling Act (January, 1923). The notes accompanying this draft show the

*See an able article "Law Making by Property Owners," by Professor Howard Lee McBain, of Columbia University, in the Political Science Quarterly of December, 1921.

†"History of Greece III," 131.

greatest antipathy to the limitations of the Constitution and a high degree of ingenuity in avoiding them. For instance, the Committee recommends that such an Enabling Act contain no declaration that the act is not retroactive. The explanatory notes say:

“Some laws contain a provision to the effect that, ‘the powers by this Act conferred shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted.’ While the almost universal practice is to make Zoning Ordinances *non-retroactive*, it is recognized that there may arise local conditions of a peculiar character, that make it necessary and desirable to deal with some isolated case by means of a retroactive provision affecting that case only. For this reason it does not seem wise to debar the local legislative body from dealing with such a situation.”

They have also invented the term of “Interim Zoning” which they apply to an ordinance providing that, “whenever three-fourths of the houses in a block are residential, then no new business structure or factory can be built in the block.” The notes continue as follows:

“The reason it is objectionable is because it is too general, not sufficiently adapted to the particular need of each street and therefore likely to be arbitrary in many cases. In such case, if a new house is built or an old one destroyed, the legal protection of the district may be altered. In this sense the district is a ‘traveling zone.’ As such, a district has no stability, and as the police power may be differently applied according to the acts of property owners, it is not looked upon with favor by the courts.”

“For,” the pamphlet continues, “a provision is void that a non-conforming building can be built if a majority consents in writing. The ordinance should always be phrased so as to prohibit the non-conforming use unless the desired majority files written consent with the officials.”*

It is further recommended that one of the purposes of the act be not stated as “public health” but only “health,” because “public health” narrows the application.

It is further recommended that the regulations control density of population. This, it is said, is comparatively new in zoning practice, but highly desirable. For this reason the general phrase, “density of population” is regarded as a better phrase than, “power to limit the number of people to the acre” as this is only one method of limiting the density. “It may be more desirable to limit the number of families to the acre,” etc. It is believed by the zoners that with proper restriction the provision will make possible the creation of one family residence districts.

It is further recommended that the power to regulate be not only given for the specified purposes but for “other purposes,” this having the advantage, as they say, of being a “catch phrase” and will “include every use.” So it is further recommended that the power be given to establish set-back building lines and even to regulate and restrict repairs as well as the use of buildings.

It is further recommended in the same circular that the remedies be drastic so that the authorities, “may sue the responsible person for a penalty in a civil suit; they may arrest the offender and put him in jail; they may

*See this distinction discussed by Professor McBain in the article alluded to.

stop the work in the case of a new building, and prevent its going on; they may prevent the occupancy of a building and keep it vacant until such time as the conditions complained of are remedied; they can evict the occupants of a building when the conditions are contrary to law, and prevent its reoccupancy until the conditions have been cured. All of these things the local authorities should be given power to do if Zoning laws are to be effective." This bureaucratic program is issued by a division of the Department of Commerce.

THE CONSTITUTION VAIN WITHOUT LEGISLATIVE RESTRAINT

The final result of the present tendency must fill one with alarm for if the constitution is powerless against the insidious argument of the police power, the growing possibilities of the taxing power, the continuous nibbling of the bureaucratic tendency, it is uncertain how effective its hollow framework may be.

James Russell Lowell said in his address, "The Independent in Politics" (1888):

"The late M. Guizot once asked me 'how long I thought our republic would endure.' I replied, 'So long as the ideas of the men who founded it continue dominant' and he assented."*

Washington understood the danger of combining the various branches of government upon which I have commented. Writing in 1788, he said, "These * * * powers are so distributed among the legislative executive and judicial branches, into which the government is ranged that it can never be in danger of degenerating

*Lowell's Works, VI, 207.

into a monarchy, an oligarchy, or an aristocracy, or any other despotic or oppressive form so long as there shall remain any virtue in the body of the people.'''* By virtue he undoubtedly meant that mental, moral and political self-restraint without which constitutionalism is an empty name.

*Washington to Lafayette. Writings of Washington, Ford. XI. 219.

APPENDIX

ANALYSIS OF THE PHILADELPHIA ORDINANCE

The Ordinance divided the City into three kinds of districts, designated as Use Districts, Height Districts and Area Districts, located and bounded as shown on the District Maps of the City made by the Zoning Commission, which maps, sixty-three in number, were made part of the Ordinance. It provided that every building erected or located and every use within a building or accessory thereto should be in conformity with the provisions of the ordinance, and that any existing building or use not in conformity therewith should be considered as non-conforming.

USE DISTRICTS

Use Districts were of four kinds:

First.—Residential Districts for dwellings.

Second.—Commercial Districts for business and trades.

Third.—Industrial Districts.

Fourth.—Least Restricted Districts.

It provided that only such uses or accessory uses as were defined in the said Ordinance should be permitted within the several districts. In the Residential Districts there were only allowed dwellings and as accessory uses thereto, professional offices, private garages and private stables. It was provided that buildings for educational, philanthropic, recreational and religious uses which are in no way objectionable or detrimental to the residential character of the district would be permitted, subject to special location permits to be granted by the Zoning Com-

mission after public hearing. The following uses were to be allowed:

“Club houses, educational buildings, hospitals and sanitariums, nurseries, green houses, places of worship, recreation buildings, libraries, art galleries, public museums, philanthropic and eleemosynary institutions, and necessary public utilities, including community heating and lighting plants, and aviation fields.”

Residential Districts were to comprise all lots and buildings fronting on a residential street, and all land not designated on the Use Maps as located in the other districts.

COMMERCIAL DISTRICTS

Commercial Districts were designated for commerce, general business, and the sale of commodities and accessory uses, including light industry, provided that such accessory use was not detrimental. The uses permitted in the Residential Districts were permitted in Commercial Districts, but other uses were prohibited.

Special Location Permits issued by the Commission might permit the erection or maintenance of the following structures in a Commercial District:

“Accessory uses

Advertising structures

Community heating plants

Freight transportation and storage buildings

Power-generating plants and electric sub-stations

Public garages, community garages and public stables.”

A commercial use within a building fronting on a commercial street located on a corner lot approximately rectangular might extend such use on an intersecting

residential street to a depth not exceeding 100 feet from the corner. The commercial use of a building located on a triangular or irregular lot where commercial and residential streets intersect should not extend along the residential street more than 150 feet beyond the intersection, but such use should not extend beyond the point where the intersecting streets are 200 feet apart.

INDUSTRIAL DISTRICTS

Industrial Districts were designated primarily for industries, manufactories and trades, including all processes employing power generated by electric, steam, gas, etc., provided that any such use is not detrimental, etc.

The uses permitted in Commercial Districts were permitted in Industrial Districts, but the uses permitted in the Least Restricted Districts were prohibited.

LEAST RESTRICTED DISTRICTS

The Least Restricted Districts were designated for buildings and uses without restriction as to kind, except as defined by other laws or ordinances, and include a long list of more obnoxious manufactures and trades from blast furnaces to stock yards. In the Least Restricted District no dwelling was permitted other than for the use of watchmen and caretakers.

The Ordinance as drawn involved an attempt to catalogue all possible uses but it was provided that any desired use not specifically mentioned should be assigned to such Use District as may be designated by the Zoning Commission.

Non-conforming buildings were to be continued provided that no addition thereto should be permitted exceeding 25 per cent. of the area of the building at the time of the approval of the Ordinance, and all such exten-

sions should be in conformity with the provisions of the Ordinance and no subsequent additions should be permitted.

SOME EFFECTS OF THE USE RESTRICTIONS

Before passing to the Height and Area Regulations, it may be well to observe:

First.—That in the Residential District no shop or store of any kind was allowed unless already established. If established, it became a permanent monopoly, because no further competition was possible in that particular district.

For this reason the value which any other property in the district would have for such a prospective purpose, would be shifted to the property already so occupied and is represented in the monopolistic value enjoyed by the owner.

Second.—Any one living in a Residential District must go to the nearest Commercial District for supplies of all kinds, unless obtainable at such a monopolistic shop. The possible convenience of having supplies near the dwellings was not considered sufficient to render a shop tolerable. An ordinary shop, no matter what its stock in trade, is therefore under the terms of the Ordinance relegated in the Residence District to the position of a nuisance.

Third.—Under the Ordinance as drawn it would be quite impossible to conduct any sort of business in one's residence; even an educational use could only be established in one's dwelling by obtaining a Special Local Location Permit from the Zoning Commission, and if one wished to conduct a cobbler's business or to use for business purposes a hand loom or a small printing press in his residence, it would not be allowable.

Fourth.—It is also to be observed that a public utility could only be established in a residential section by permission of the Zoning Commission after public hearing. It would be therefore quite impossible for a public utility to establish a plant without first giving publicity to its plans, which would effectually prevent its purchasing any property at reasonable cost.

Fifth.—If any one wished to start a new kind of business he might first have to have the business allocated to a particular district by the Zoning Commission, unless he was willing to locate in the Least Restricted District. He might, therefore, not be able to buy a property for the purpose until he knew where he would be allowed to locate. The result of this might well be that he would not locate in the City at all.

Sixth.—Under the provision that there shall be no dwellings in the Least Restricted District, any owner whose property is included in such a district is prevented from developing it unless he chooses to embark in business in the midst of obnoxious neighbors. The depressing effect where a large tract is so degraded is obvious.

LICENSES FOR EVERY OCCUPATION

Probably it was not at first observed by the Zoning enthusiasts that the Ordinance would involve a license to teach school even in one's own home. This is obnoxious to American policy, but normal in Prussia where all education is under the control of the State, and where even a private tutor must be licensed.*

*Collier, Germany and Germans, page 283.

HEIGHT DISTRICTS

The City was divided into various Districts designated as:

1	Times	Height	District
1½	“	“	“
2	“	“	“
2½	“	“	“
3	“	“	“

In this peculiar nomenclature the terms denote the number of times which the maximum height of any building at the street line bears to the width of the street; that is to say, in a 1 Times Height District on a 30 feet street you may build 30 feet high, in a 2 Times Height District 60 feet high. There is a provision allowing a unit of increase for each foot of setback which also varies in the different districts. If your building line sets back one foot in the 1 Times Height District you can build 1 foot higher, in the 2 Times Height District 2 feet higher, in the 3 Times Height District 3 feet higher. This allowance in the case of a setback from the rear is doubled. This makes a very complicated table, requiring considerable study to determine what one's rights are on any particular lot. There was provided also a maximum building height limit in the different districts, as follows:

1	Times	Height	District	45 feet
1½	“	“	“	65 “
2	“	“	“	85 “
2½	“	“	“	125 “
3	“	“	“	150 “

If a building is located at the intersection of two streets, the height limit allowed for the frontage abutting on the wider street governs the height limit and setback along the other frontage for a distance of 100 feet.

Before passing to the Area regulations, it may be well to consider the effects of these restrictions.

SOME EFFECTS OF THE HEIGHT RESTRICTIONS

First.—The height limitation is much stricter than in New York, in that it provides an absolute limitation for each District. As this limitation is fixed according to the width of the street, it follows that a lot with more than one front may be subject to different height limits on different fronts of the lot, which precludes an economical and symmetrical development.

Second.—The antipathy to high buildings displayed by the Ordinance is on the assumption that they are a detriment, whereas for business they are a necessity and for health they are the most sanitary of all buildings.*

Third.—It is also evident that where an addition is made to a building not now conforming in height, it may be impossible to conform the new structure to the older building.

Fourth.—It is also evident that the value of a piece of real estate which has been bought upon the supposition that it could be improved with a high building is immensely depreciated and that as in the case of a monopoly of a store, the value taken away from the unimproved lot is added to the higher buildings already erected.

Fifth.—It is also to be observed that in the Height as in the Area District, the lines determining the areas do not run on streets, but run back of them and may bisect a particular property, so that a particular lot may fall in two Area Districts or in two Height Districts.

*See this question discussed in the memorial addressed to council January 1922.

AREA DISTRICTS

In a similar way, the City is divided into five Area Districts, in each of which the area of a lot which may be incumbered by buildings is expressed in percentage of the whole as follows:

“A District		30	per cent.
B	“	50	“ “
C	“	70	“ “
D	“	90	“ “
E	“	95	“ “ ”

The regulation as to area is accompanied with a complicated table showing the mandatory requirements for incumbered and unincumbered areas in the different classes, depending on the location of the unincumbered area in front yards, side yards or back yards and depending also on the character of the building, whether dwelling or not.

Combining these various regulations, we find in a Residential District that a man owning property containing 10 acres will be allowed to build on only 30 per cent.* of his lot; if he builds on the property line he can only build to a height of 45 feet, and he would be unable to conduct the simplest and most harmless kind of business. Home industry such as has been heralded by another type of reformers, as a hoped-for result of transmission of electric current, is put out of the question.

In order to enforce the complicated machinery of the Ordinance, it requires that Zoning Certificates shall be secured from the Zoning Division prior to the construction or alteration of any building, the Zoning Certificate to be granted or refused within fifteen days after the filing of such application.

*Increased to thirty-five in the ordinance now proposed for West Philadelphia.

Occupancy Permits are to be required for every building in use other than residential in the three other Districts and for every non-conforming use within the Residential District, and for each subsequent change of use in any district. Occupancy Permits from the Zoning Division are to be required within one year from the date of the Ordinance.

It was stated when the Ordinance was pending that the number of permits immediately required was 40,000.

PENALTIES

As is usual in regulations of this kind, the Ordinance is highly penal. Violation persisted in for more than thirty days after notice from the Zoning Division subjects to a penalty of \$75.00 for every violation, and a further penalty of \$50.00 for every period of thirty days after the imposition of the first penalty.

For the purpose of carrying out the Ordinance, there is organized a Zoning Division as part of the Bureau of Surveys, Department of Public Works, which is to issue the certificates and permits.

Petitions for changes in the location of the districts are to be heard by the Zoning Commission, which with the approval of Council, may make such changes as are deemed desirable and necessary, petitions for changes to be made to the Commission by the registered owners of more than one-half of the block frontage between two main streets. If a protest is made by at least one-third of the registered owners, "such appeal" shall not be granted except by vote of three-fourths of the entire Zoning Commission, appeals from the issuance or refusal of certificates or permits to be decided by the Zoning Commission. The Zoning Division and the Zoning Commission are each

to make such rules and regulations as may be deemed necessary.

It will be observed that no revision of any of the Districts can be made by the Zoning Commission without the approval of Council.

WHAT HAPPENED TO THE ORDINANCE

This Ordinance was presented to Council for passage without any report in writing showing its necessity or justifying its principles or the particular limitation of areas. It was immediately evident that the damage threatened to property owners and business interest was very great and opposition developed.*

After hearings before the Zoning Committee of Council, that Committee by resolution eliminated from the operation of the Ordinance all of the old City of Philadelphia, from Vine to South and from River to River. This action practically killed the Ordinance, and no further attempt has been made to pass it, because, as I suppose, it was thought that to cut out the central part of the City would render the Ordinance if passed in that shape unconstitutional. The thanks of the City are due to the foresight and independence of those councilmen who secured its defeat. The building of numerous important buildings begun since then, eight or ten in number, is sufficient evidence that they were right. The Ordinance has now been partially resurrected so as to apply to West Philadelphia only.

The suggestion as to the necessity of neighborhood shops has been met in the new Ordinance by including a provision that a corner store may be built in Residential

*Copies of memorandum submitted on behalf of Fidelity Trust Company to the Committee of Council, analysing the ordinance and protesting against its passage, can be had by addressing the Company.

Districts except in Class A and Class B Area Districts, which may be classed as suburban (page 6). Why a store should be allowed on the corner and not elsewhere the Commission has not so far as I know explained. The result of such a discrimination is to give the corner an additional value over the other lots, and therefore as in the case of the established "non-conforming" store to transfer a portion of the value of one man's property to another.

The new Ordinance has also introduced in the Residential Districts uses described as "Home occupations." What is meant by this term, of course, cannot be determined until the Zoning Commission rules on it. It can only mean such occupations as *the Commission may from time to time think* ought to be carried on at home.

With the new Ordinance for West Philadelphia there are presented three new maps making certain changes in the allotment of territory to the different districts. The section South of Penrose Avenue has been made Industrial instead of Residential. The half block on the side of the Philadelphia & Reading Railroad tracks between 74th Street and 91st Street has been made Industrial instead of Residential. This is over a mile in length; whereas property on the line of the P. W. & B. Railroad from 61st to 73d Streets and on Elmwood Avenue, between 68th Street and 70th, which latter was formerly Industrial has been made Residential, although on the line of the railroad. It is difficult for anyone to see why if a railroad is to determine that property is to be industrial, the P. B. & W. Railroad would not have the same effect as the Philadelphia & Reading.

There are in the map some fifteen or twenty other changes for which the Commission no doubt have their reasons which are not evident to others. In general, the

height restriction has been made a little more liberal and some of the area districts have been changed to more liberal allowance and some have been more strictly limited.

These changes in the original Ordinance are evidence of the great power that will be vested in the Commission and Council should all of the property within the City be placed under their control by a Zoning Ordinance.

“The accusation which the historian is bound to bring against every government which has hitherto existed is, that it has overstepped its proper functions, and at each step has done incalculable harm. The love of exercising power has been found so universal that no class of men who have possessed authority have been able to avoid abusing it.”

***Buckle, “History of Civilization,”
(1857) Vol. 1, Chap. V. p. 280***

THE PRINCIPLES OF ZONING

Being the substance of an address
delivered before the
Forum of the Philadelphia Chapter of the
American Institute of Banking

March 21, 1923

BY
WILLIAM P. GEST

President of the Fidelity Trust Company
Philadelphia

***“The Legislative Department is everywhere
extending the sphere of its activity, and draw-
ing all power into its impetuous vortex.”***

***James Madison, in The Federalist
No. XLVII, P. 343***

Mr. Chairman and Gentlemen of the Forum:

I respond with pleasure to the request to explain the Principles of Zoning for many reasons. It is an honor because the subject is difficult. Zoning touches on life in many ways, constitutionally, legislatively, economically, socially. It is not possible to study all the laws that impend. When I read in the papers that there were 14,000 bills presented to the last Congress, I am reminded of the sentiment of Tacitus, spoken of the reign of one of the Emperors. "As formerly we were plagued by wickedness, so now by laws."* Tacitus was speaking particularly of the *Lex Julia et Papia Poppaea*, a drastic law against bachelors, such as has been actively urged in France, and talked of here. So let the Juniors of our Chapter beware and not delay too long. People accept whatever laws are passed in a passive optimism, like that of the old darkey in the days of the Civil Rights Bill, who said he "didn't know what there was in dat ar bill, but if there war any provisions in it he sho' wanted 'em."

But there is another reason why the subject demands attention. Professor Arthur Hadley says in his *Economics* (page 18):

"The advantages of intervention on the part of a government are visible and tangible facts; the evil that results from such intervention is much more indirect and can only be appreciated after close and intensive study."

A Zoning Ordinance is an ordinance which divides a municipality into various districts or zones and regulates

**Ut olim flagitiis, sic nunc legibus laboramus. Tac. Annals, III. 25.*

in those zones the location, size and use of buildings. In order to explain this in detail, I will analyze the Philadelphia Ordinance, which was presented to the City Councils about a year ago.*

DESCRIPTION OF THE PHILADELPHIA ORDINANCE

The Ordinance was presented under section 9 of Article II, the Act of Assembly approved June 25, 1919, entitled "An Act for the better government of cities of the first class in this Commonwealth." (P. L. 581.) It provided that, "for the purpose of promoting the public health, safety, order and general welfare," any such city may regulate the location, size and use of buildings therein, and may make different regulations for different districts thereof.

The Ordinance divided the City into three kinds of Districts; Use Districts, Height Districts, and Area Districts. These districts were shown by certain maps, and were not described by meets and bounds. The maps were sixty-three in number, and the districts of various kinds were not coterminous with each other.

USE DISTRICTS

Use Districts were graded into Residential, Commercial, Industrial and Least Restricted or "nuisance" districts.

In Residential Districts there were only to be dwellings, professional offices, etc., and certain other buildings by special permit of the Zoning Commission.

Commercial Districts were for general business and light industry.

Industrial Districts were for manufactories and trades.

*A more detailed analysis with sundry comments will be found in the Appendix hereto.

The Least Restricted Districts were to include the obnoxious manufactories, such as stockyards, etc.

No dwellings were to be allowed in the last named district.

No occupation, not even teaching school in one's house, could be carried on in the Residential District without a permit. No new stores were to be allowed, but if a store was already established it was allowed to continue under certain restrictions, such a store being thereby granted a sort of monopoly. By this the value of all of the other properties in the district would be, naturally, diminished for the benefit of the store, they being tributary to it.

HEIGHT DISTRICTS

The Height Districts were five in number. In them the height of a building on the building line was limited to certain proportions of the width of the street, namely, 1 Time, 1½ Times, 2 Times, 2½ Times and 3 Times. An additional height was allowed according to the setback from the street line. An absolute limitation was put upon all buildings in the respective districts, varying from forty-five feet in the 1 Time District to one hundred and fifty feet in the 3 Times District.

By these regulations some part of the value of unimproved real estate would be necessarily transferred to other improved property in the neighborhood.

It is the assumption of the Ordinance that high buildings are a detriment. No note is taken of the fact that for modern business they have become a necessity, and that for health they are much better than the old-fashioned buildings.

AREA DISTRICTS

Area Districts were to be five in number, classified according to the area of the lot which might be incum-

bered by buildings, varying from thirty per cent. to ninety-five per cent. By this restriction a large part of the value of many pieces of land would be taken away. Indeed it is evident that in each of the three classes of restriction, Use, Height and Area, a very considerable portion of the value of property is either transferred to neighbors, or to the public, or destroyed.

It is the assumption of the advocates of zoning that this value goes to the public, and that it should go to the public without compensation to the owners.

In order to enforce the system Zoning certificates and permits were to be required. The number which would have been immediately required, had the Ordinance gone into effect, was many thousands.

Violations of the Ordinance were to be punished by severe penalties. The Ordinance was to be carried out by a Zoning Division, organized as a part of the Department of Public Works.

Alteration of the restrictions to which any property was subjected could only be made by the Zoning Commission with the approval of City Council.

DIFFERENCE BETWEEN GENERAL LAWS AND ZONING

The fundamental novelty of the Zoning Ordinance is that the control of the use of real property is transferred into the hands of an appointed commission, which is *empowered to make, change and enforce enactments special to each district* affecting every piece of real estate in the community. Heretofore we have been governed by general laws. General laws are the index of a free and advanced civilization. Particular judgments are characteristic of primitive conditions. They were sustained in early days by the belief that they were inspired by a divine afflatus at the time of judgment. The theory

of this divine afflatus is not impressive in the case of political commissions. The advantages of general laws are: Fairness in application and in enforcement. By them a man can lay his plans and be advised by counsel of the rights on which he may rely. A modern state is founded on justice, and justice consists in generality and uniformity.*

This important distinction is overlooked by the advocates of Zoning. It has been stated that Zoning in Philadelphia began in 1855 in the Act of Assembly which provided that every dwelling should have an open space attached equal to at least twelve feet square.† But as this Act governed all buildings in Philadelphia there was no such thing as a “zone” connected with it. I may interject at this point that the proper way to increase the comfort and sanitation of dwellings is by a gradual improvement of the building laws. The requirement of 144 square feet might well have been increased long ago, and the exception that a tenement on a lot bounded by three streets may be erected to cover the whole lot,‡ might well have been removed. But the principal fault is not in the sanitary laws as drawn, but in the administration of them. We all know that the laws as to underdraining are not enforced. If politics has any influence now what would it be if every use is drawn into its meshes?

PRINCIPLES OF ZONING

From the above, we are able to formulate the principles on which the Zoning Ordinance is based. They are:

First.—That the kind of use of every man’s property should be controlled by a central authority.

*“Political Ethics,” Francis Lieber, page 185.

†Act of April 21, 1855. Re-enacted in Act of May 5, 1899.

‡Act of June 5, 1895, Section 2.

Second.—That this authority should be an Administrative Commission and not a Judicial Body.

Third.—That this Commission should be a politically appointed body.

Fourth.—That the damage inflicted on property by the Zoning restrictions goes to the benefit of the general public.

Fifth.—That this deprivation of right is justifiable as an exercise of the Police power.

Sixth.—That therefore the public can take away the rights of the individual without compensation.

These principles are new to America and the burden is on their proponents to demonstrate them. In view of their importance they should not be taken for granted but should be clearly proven.

ARE THE PRINCIPLES OF ZONING ESTABLISHED BY EXPERIENCE?

First.—As to our own experience, let us ask ourselves whether the way in which our municipalities manage their own property enlists our confidence in their ability to plan for all the property in a city in which there are some 500,000 buildings.*

Has the management of gas or of transit or of water or of markets or of housing filled us with such admiration of their care or judgment or prudence or business sagacity that we are willing to tie our own property to their judgment and allow them permanently to fix its status?

But still more, are we ready to abide by the decision of an appointed Commission which in the beginning has allowed the detail to be decided by a few men whose con-

*There were in 1920, 453,747. Philadelphia Year Book for 1920, page 33.

clusions were not unanimous, whose first judgment has already been repudiated, and whose second plan arbitrarily varies from their first?

A BUREAUCRATIC METHOD—NOT A JUDICIAL ONE

Second.—It is to be especially remembered that the decisions of the Zoning Commission are not reached by a judicial process. It is an administrative method, subject to all of the limitations and uncertainties of bureaucracy, and the ultimate decision is with Council, a political body. The advantages to the citizens of legal procedure are many. A suit at law is tried before a qualified judge, under a judicial oath, with a regular procedure, in open court, under uniform principles providing an equal law for all. The decision is subject to review by a competent authority. There is a record of the judgment and the reasons therefor; the judicial method therefore produces a greater respect among the people and a wider obedience to the law.

It is said, however, in justification of Zoning, that litigation is slow and expensive, and should be superseded by the quicker method of official administration. It is true that litigation is unpleasant, but self-defence is the price of liberty. A free citizen is one who knows his rights, and knowing dares maintain. His suit is between two citizens with equal chances of justice. In a method of bureaucratic administration the field of litigation is shifted. The suit is then brought by a citizen against an arm of the government with unequal chances of justice. If such a system should reduce litigation it would do so only at the expense of individual initiative and the manhood of the citizen.

The Zoning propaganda is symptomatic of a great reaction. Many Americans are growing tired of the

moral responsibilities of freedom, of the respect for others' rights and the vindication of their own. Weary they wish to lean against the State. Their mood is like that of Israel in the days of Samuel. They are turning away from the theocracy of liberty, which brought them out of their tribulations, and are beseeching the prophets of welfare to give them an absolute government like other nations.* If the parallel is completed the sequence will be a history of oppression.

WHAT ABOUT POLITICS?

Third.—But the Commission itself is a political body and as well as the Division of the Bureau of Surveys, subject to appointment by the Mayor. Whether politics ever has or could have in our City anything to do with licenses and permits or other papers issuing from City Hall, I leave to the judgment of those more experienced.

But it is evident that apart from politics, individual judgment, not to say caprice, may withhold or delay a license. I suppose we have all heard of inspectors of particularly characteristic views who have their own ideas about doorways, or fire escapes, fire towers, English villages, etc.

WHAT BECOMES OF THE VALUE TAKEN?

Fourth.—The next underlying assumption of Zoning is that the value which is taken from property owners goes to the benefit of the general public. This is unproved and in part is evidently untrue. For, in the first place, it is quite possible to destroy value without transferring it to anyone. If, for instance, a larger area is allocated to the Least Restricted District than is or will be required for objectionable businesses, the value of the property is taken away without anyone being benefited,

*I Samuel, VII, 5.

and if a greater area is allocated to a residence section than is required, a similar result follows.

It is frequently said that Zoning stabilizes values and as frequently is the case, a vast and unreliable assumption lies hid under a catch phrase. Whether prices are raised or depressed depends upon the law of supply and demand. If you allocate more than there is demand for, prices will tend to fall, for the taxpayer has no use for the property unless he tempts a buyer. On the other hand, if a less area is allocated than there is demand for, prices will tend to rise until the point is reached when improvements of the particular kind will be forced away from the city. In neither of these cases are values stabilized. But what body of men has the prescience as well as the omniscience to know what area is or will be necessary for all possible trades in a region such as Philadelphia, which as a manufacturing district is in competition with fifty miles of river front?

For similar reasons, if one district is degraded by a restricted use, the real estate therein already occupied by dwellings is depressed and part of its value is taken away and added to the more favored areas.

Where building heights are suddenly restricted, the value of a certain property which has increased on account of its availability for a high building is taken away and is added to the high buildings already erected in that locality with which it would compete and which are therefore given an additional value by reason of a *quasi* monopoly.

It is proposed that this be done even after the potential value of the unimproved sites has been recognized by the City by increased taxation. In such case the City deprives the property of a use for which the City has already been receiving payments.

It shows the effect of assertion accepted without analysis that many people think such a Zoning Ordinance will help the poor, and in fact the Philadelphia Housing Association, with whose aims I have the greatest sympathy, has actually urged the passage of the Ordinance. But the middle and poorer classes are excluded from the Least Restricted Zone by the prohibition of the Ordinance and are precluded from the most favored zone by the expense. They are forced, therefore, into the Commercial and Industrial Areas. This congestion tends to augment rents, diminish repairs, and raise values in those districts. The only class which is really favored is the wealthy class, which is protected from the incursion of the poor, so that *the Ordinance really tends to stabilize the values of the rich at the expense of the poor*. As the natural sequence is less improved houses in bad places and higher rents in favored localities, the next step in our present legislative temper will be various laws to restrict rents, our legislatures being now continuously employed in endeavoring to pull down with one hand what they have erected with the other. Let us beware of what is called a poor man's law—it may turn out to be a rich man's law; but in this country we want no poor man's law and no rich man's law, but only every man's law.

It must not be thought that the injustice is done once for all when a Zoning Ordinance is adopted, for every considerable change thereafter has a similar train of consequences. This is now being found in Boston, where there has been a limitation on the height of buildings since 1891. An agitation has now been started there to increase the height allowed. As is very natural, owners who have already built up to the old limit of 125 feet, "object to an extension of the limit because when they built they were restricted in the use of their land by the

State acting under the police power. They received no compensation for such restriction except *the assurance that their neighbors would be similarly restricted*, and if the restrictions are now relaxed they are put to a disadvantage.’’*

POLICE POWER A VERY HANDY TERM

Fifth.—Nevertheless, this spoliation of value and this distribution thereof among the wealthier classes is termed an exercise of the police power. I shall presently recur to the meaning of this term. For the present, it is sufficient to say that it has been inordinately expanded from meaning such exercise of the power of the State as is necessary to protect the health and life and property of owners to any arbitrary exercise of power alleged but not proved to enhance the public welfare.

A PHRASE INSTEAD OF JUSTICE

Sixth.—Having alleged that zoning is a proper exercise of the police power, the proponents carry over with that doctrine the corollary that property taken under the police power is not subject to compensation. Now, this has been decided as to objects clearly within the police power but to extend it to embrace all damage inflicted by any ordinance stated to be for the general welfare is to introduce a destructive socialistic program under the terms of constitutionalism.

HISTORIC EXAMPLES OF ZONING

Zoning is promulgated on the example of German cities, but it is not peculiar to Germany. Many medieval and tyrannical governments indulged in it. Germany has in this, as in other things, put an autocratic anachronism into modern dress.

*See Report of the City Committee on Height of Buildings made to the Directors of the Boston Real Estate Exchange, March 6, 1923.

Before speaking particularly of Germany let us look at an example or two of English Zoning. "London in 1629 had improved in wealth and grandeur. The gay appearance of the goldsmiths' shops, shining with burnished plate in Goldsmiths' Row in Cheapside was thought very grand." I am quoting from Macpherson's *Anderson's Annals of Commerce*. So in 1637 King Charles, "who delighted too much in copying after any arbitrary order of other nations, commanded all the silversmiths to live in Goldsmiths' Row. The cruelty and absurdity of this order is so obvious to everyone," says the judicious Annalist, "that it is needless to make any further comment on it. Possibly such as were to be indulged in this case paid sufficiently for it."*

It is interesting to observe similar attempts in the other departments of Zoning. The same King, in 1630, issued a proclamation against erecting houses on new foundations within three miles of any of the gates of London, or of the Palace of Westminster; also against entertaining inmates of houses there, "which would multiply the inhabitants to such an excessive number that they could neither be governed nor fed." This followed an earlier proclamation of James I, (1618) in which the provision was for two miles only, but James only followed an earlier proclamation of Elizabeth, (1602) which followed an earlier one of 1593, which followed an earlier one of 1580, wherein the limitation was three miles. Speaking of the proclamation of 1602, Macpherson (1805) says it was issued, "after the unaccountable humor of that age, in foreseeing dangers that never yet happened, nor are ever like to happen from an increase in the suburbs of London."

*"Annals of Commerce," Vol. II, page 401.

Of course, these gestures of the land owners were impotent against the economic trend. The population of London was, in 1590, say 150,000 to 160,000.*

The high watermark of medieval zoning was the Ghetto. It is not likely to be urged in this country for the Jews for they are active and wealthy. But how about the Negroes? It would certainly "stabilize property" to have a Jim Crow Zone. The Constitutional Amendment need not stand in the way. No Constitutional Amendment has the respect which was formerly accorded it. The Thirteenth is a dead letter in many places; the Eighteenth in many other places; if the Fourteenth does not protect property how long will it protect person?

GERMAN POLICY DISCUSSED

Modern Zoning was gradually developed in German cities in the latter part of the last century, but was not fully established until the last fifteen or twenty years thereof.

Even in Germany it has had scarcely time enough to demonstrate its economic effects.

There are several reasons why what is applicable in Germany is not so in America.

It will help to understand the contrast between the administration of German cities and of American if we call to mind a few of the facts relating to municipal life in Germany. I will quote the facts from "Municipal Life and Government in Germany" by William H. Dawson (Second Edition, 1916).† This book was written just

*See "Macpherson's Annals of Commerce," Vol. 1, 195; Vol. 2, 166, 202, 227 and 364.

†See also "Bismark and State Socialism," Dawson, 1891.

"Socialized Germany," Frederick C. Howe, 1915.

For an abstract of the underlying philosophy see "Germany and England," J. A. Cramb, 1914.

For a general account, "Germany and the Germans," Collier, 1914.

before the war largely to show the British public how much better municipal regulation was in Germany than in England.

Recollect, then, that the German cities have an early tradition of self-government and are many of them older than the State. Three of them, Hamburg, Bremen and Lübeck, are still free cities (unless their status has been changed since the inauguration of the republic).

“By the traditions of German cities, the civic tie was frequently stronger than the national.”*

When absolutism was in vogue in Europe, the city managed its citizens, “in the best manner of the autocratic overlord” (page 8). The Council of Hamburg issued a proclamation in 1602 affirming, “If a government should be lordly, godless, tyrannical and covetous, the subjects have still no right to resist; they should rather regard such a condition as a punishment of the Almighty visited upon them for their sins.”

When Napoleon entered the country, he was obediently received by State Officials and military officers, “so lightly,” says Dawson, “may the sentiment of loyalty hold and compel an overdisciplined people” (page 13).

Even the reform of the city governments of Germany introduced by Stein was given to the nation from above. “In truth,” says Dawson, “Stein wished to create an effective system of self-government as much for the sake of the State as in the interests of the people who were henceforth to manage their own affairs.”

The Municipal Ordinance of 1808 provided that the Town Counsellors as a whole should control the entire administration of the municipality in all its branches (page 19). The chief mayors of the large towns were to

*Dawson, page 1 to 3.

be nominated by the Crown from lists presented by the towns (page 20).

German towns may in general enter upon any trading enterprise to any extent (page 25) and there is no limit to their general administrative powers (pages 30, 32).

In addition to that, the German Municipal System is unified. There is only one taxing authority and the same authority administers education, poor relief, city planning, roads, art, learning, music, drama and social welfare (page 33). Most of the larger towns carry on savings banks, finance societies, mortgage banks, labor registries, house building, unemployment insurance, fire insurance, etc., as well as sundry trades hereinafter mentioned.

Wide powers of supervision and control are exercised by the State and justified on the theory that all local government is a devolution of State function and authority.

It was natural under such a theory that the police power should be greatly expanded. By the old law of Prussia, "it is the office of the police to provide the measures necessary to maintain public peace, security and order and to avert danger threatening the public or individuals. The State reserved the power to establish its own police directions in the towns and to transfer the exercise of police functions to the Legislature, which will then exercise the same in commission. "In this capacity, the magistracies shall be regarded as State authorities." This provision is still in force in Prussia. The Mayor in the German city, therefore, is not only the head of the town but he is the agent of the State (page 42). The State exercises a similar control over education and no one can teach in Prussia without a license (page 44).

Under the above system, one sees exercised from day to day and from hour to hour powers for which there is

no specific legal sanction. To state the whole situation in a sentence we may use the words of a German writer quoted by Dawson: "Like the absolute city of old, the modern towns are conscious of the will and power to advance and direct the entire social life of their citizens."*

There is another important point in which German cities differ from American and that is the right of suffrage. The usual qualification in Prussia is the ownership of a dwelling house in the commune, assessment to State income tax or carrying on an independent business, etc., all of these conditions implying liability to pay local taxation. A term of residence is also prescribed, varying from one year to twenty-six (page 65). Among the disqualifications may be mentioned the refusal to undertake honorary civil office when required, etc.

German towns are as a rule largely governed by permanent officials (page 77), and the executives of most large towns are frequently men of ripe experience, business training, practical judgment, and sometimes ample leisure (page 78). In the administrative staffs the higher appointments are frequently life appointments (page 99), and administrative positions are much desired (page 100).

German towns by long tradition generally own a considerable portion of the land within their administrative areas. The proportion of the number of acres owned by the towns to one thousand inhabitants varies in the principal cities from twenty-one in Munich to nine hundred and three in Görlitz, and the percentage of land owned varies in some of the towns from twenty per cent. to seventy-seven per cent. (page 108, etc.)

Berlin owns a total of 52,000 acres in and outside of the administrative area, and many towns make large gains

*Philip Stein, cited in Dawson, page 51.

from their systematic trading in land (page 116). They sell public land for housing schemes.

From the ownership of land follows the necessity of town planning. "Thus," says Dawson, "the *newer** town plans invariably set apart a set area for industry. As the towns own the land, no set legislation has been needed in order to enable them to carry out such plans."

The old common law of Prussia of 1794 contains the provision that buildings which spoil the appearance of a public place may be prohibited by the police authority, charged with the regulation of building, and this authority can require the removal of any erection that is offensive to the eye (page 132). Since then, the building authorities in Prussia are empowered to refuse sanction to the erection of buildings that would disfigure important streets.

In these provisions we see the origin of such bodies as Art Juries, which though extralegal to our system have been transplanted to our own city.

Many Prussian towns go even so far as to give advice to architects (page 133)!

It was natural for German policy to develop housing policies, but apparently these policies have not been as successful as we are sometimes told. I quote from Dawson as follows:

"A well-known German housing reformer, Dr. Stüb-
ben of Berlin, said recently, 'The price which we pay in
Germany for the possession of the best planned towns
in the world is the destruction of the home. High
prices of land, high rents and high taxes prevent the
building of small houses and lead to the erection of huge
barracks, with the result that the workman, like many

*Italics are my own.

others, seeks recreation not in his home, but in the public house" (page 139).

"In the Rhineland there are found, owing to perverse building regulations, made to satisfy the requirements of building speculators, narrow courtyards without air or sun, frightful ventilation shafts, the ever dark landings, semi-dark rooms and other defects which are a parody on the simplest requirements of hygiene."

"It is indeed," says Dawson, "no exaggeration to say that after allowing for much common exemplary building, housing conditions are nowhere so bad with so little justification as in many of the newer industrial towns of Germany."

The most notorious home of the barrack house is Berlin. The average number of persons per inhabited house in that city is seventy-seven. Some of the larger cities rank down to twenty and the Berlin average is kept down by the relatively small average prevalent in the well-to-do districts of the West, where whole districts have an average no higher than twenty-six. Half the dwellings of Berlin contain only one room and a kitchen. Thirty-three thousand of these dwellings have only one heatable room and twenty-four hundred have no such room at all, and four thousand and ninety dwellings consist simply of a kitchen (page 141).

It was said that the great barrack house owed its existence to accident and thoughtlessness. Does it not seem strange that either of these could occur in "efficient, wonderful Germany"? But there, as everywhere, the principles applied by reformers are too often governed by fad and caprice. Wide streets were laid out, too wide for their business, and the flat house became an obsession (page 142).

Nor has the German system produced a house-owning population. It is estimated that in Berlin ninety-seven per cent. live in rented houses, in Hamburg ninety-four, and in other large cities also high percentages (page 144).

It is natural that under these conditions rents should rise in Germany. Before the war, house rents in Berlin was reckoned at thirty to fifty per cent. higher than in London.

NOTE: It may be interesting to compare the statistics of Philadelphia with those of Berlin. The following is a table of home ownership in Philadelphia, furnished by the Philadelphia Housing Association in the book prepared by Bernard J. Newman:

<i>Year</i>	<i>Total Houses</i>	<i>Per Cent. Rented</i>	<i>Per Cent. Owned by Occupant</i>	<i>Per Cent. Owned Free</i>	<i>Per Cent. Owned Mortgaged</i>
1900	265,880	77.9	22.1	54.7	45.3
1910	327,263	73.4	26.6	43.7	56.3
1920	402,946	60.5	39.5	29.8	70.2

From the above it will be seen that in twenty years the percentage of rented houses has fallen from 77.9 per cent. to 60.5 per cent. and the percentage of houses owned by the occupant has increased from 22.1 to 39.5 per cent.

Taking the number of houses in Philadelphia in 1920 at 402,946 and the population by the United States Census of 1920 at 1,823,779, it makes an average of 4.5 persons to a house, as compared with 77 in Berlin. See "Housing in Philadelphia, page 33 (1921). The figures in the above table reflect war conditions.

How is such a condition to be remedied?

"Important legislation," says Dawson, "will admittedly be necessary before the question is done with, but in the meantime local authorities are doing their best with the powers at their disposal. In many towns the old slums have been cleared away wholesale at enormous expense. Hamburg has expended several million pounds in this way, and 'costly clearances' have been made in other cities, but in Germany as everywhere,

the displacement of population under such circumstances creates the problem of its future housing.”*

Lord Roseberry in a speech at Shoreditch, at the ceremony of the opening of the Workmen’s Homes, is quoted as saying:

“You have lodged three hundred families, but you have dislodged many more. That seems to me a droll way to house the poor.”†

Of course, such conditions stimulated a paternal municipal management to build houses. Over forty-two of the larger cities have done so, but as usual, a too benevolent policy meets with its drawbacks (page 150). Freiburg began in 1862 by building houses to sell at cost. Of course, it was found immediately that the new owners were selling out at a profit.

But the German cities not only engage in house building, but in any kind of business in accordance with the old German tradition. Communal corn, wine and fruit businesses, dairy farms and other collective enterprises still remain from the earlier centuries.

Prussian towns now not only engage in water works, gas works, tramways, abattoirs, docks, markets and bathing establishments, but in quarries, breweries, inns, factories, bakeries, mines, brickmaking, mills, dance halls, fisheries, etc., etc. So common is it that of 1279 towns, only 310 small villages are or were without trading enterprises (page 184).

I have dwelt on the condition of the German cities because they have been heralded again and again as examples of a highly socialistic government uniformly successful in its undertakings, especially in housing.

*Italics are my own.

†Guyot’s “Where and Why Public Ownership Has Failed,” page 160.

HOW AMERICAN CITIES DIFFER FROM GERMAN

Let us now contrast the situation of American cities.

First.—Constitutionally, the American city is not a social entity of its own, but is a mere arm of the State for the government of a locality.

Second.—It is therefore limited as to its function and when any business is undertaken the enterprise must be justified by an enabling act. For this reason, American cities are untried and untrained in business and in what they have undertaken have not as a rule been successful.

Third.—American cities are limited much more strictly as to the debt which they can create than German cities. German cities have issued many municipal obligations which are regularly quoted two or three per cent. below State securities giving a corresponding interest.*

Fourth.—American cities being the creature of the legislature, their charters are subject to repeal or alteration by the legislature, as has been done in greater or less degree by what are known as “Ripper Bills.”

Fifth.—For the above reasons, the policies of American cities are vacillating and uncertain in business matters, and various questions are submitted to public vote which are not suitable therefor. At one time a city will own its own gas works, at another time it will lease it, and important business questions remain unsettled for long periods.

Sixth.—American cities are governed by divided authority, the mayor or executive being distinct from the Councils or Legislature, and as they are frequently of different political parties, no consistent policy can be carried out.

*Dawson, page 299.

Seventh.—The executives of American cities are elected for short periods, and are frequently not eligible for re-election, so that no sufficient time is allowed to develop a particular policy and there is no certainty if it is developed that it will not be reversed.

Eighth.—The administration of American cities is so environed by politics that a business question is not always considered on its merits.

WHY FOREIGN LAWS ARE UNSUITABLE

The reason why it is dangerous to transfer a law or part of a policy from one country to another is, that there are often implications embodied in the law not immediately obvious. The danger of transferring a law not justified by the customs of the soil to which it comes are well stated by Robert Flint, in the course of his analysis of Montesquieu's Legislative Doctrine. "It was of the very essence of his (Montesquieu's) Juridical and Political Doctrine, that positive institutions and laws are far more the effects of a nation's character than its causes, and that it is vain to expect any good from transplanting the laws and institutions of one nation to another differing from it in race, mental and moral qualities, historical antecedents and physical conditions."*

STATIC AND DYNAMIC SOCIALISM

I have shown that the Ordinance is socialistic in that it takes private property without compensation, but it is purely negative and restrictive in its action. The German cities are actively socialistic, with land and power and a program. We are, therefore, transplanting

*Robert Flint "Historical Philosophy in France, 1894," page 274.

See also Bagehot Letters on the *Coup d'Etat*.

an exotic plant to an unfruitful field. We are taking only that element of socialism which depresses and kills. It is static and not dynamic socialism.

From the above it is evident that we have no experience of our own to guide us and that the experience of German cities is not applicable to us. It remains to consider whether Zoning is justifiable upon theory.

Let us first consider

LEGISLATIVE THEORY IN AMERICA

By theory is not meant a mere hypothesis to explain the movement of legislation. The word is used to denote that collection of concordant principles demonstrated by history, commended by experience, approved by justice, intentionally adopted in our Federal and State Constitutions, and made the basis and guide of our legislative system. They include both principles of justice, which are fundamental, and principles of government which are administrative. I shall only allude to two or three of the most obvious.

PROPERTY NOT TO BE TAKEN WITHOUT COMPENSATION

First.—Those protecting liberty of person and property.

“No person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.”*

It is quite true that the first eight amendments to the Federal Constitution are not intended as limitations upon the powers of the State Legislatures, and apply to the Federal Legislature;† but the same principles are

*Constitution of the United States, Fifth Amendment (1789).

†See cases cited in Purdon's Digest, page 72.

incorporated in the constitutions of the different States in various verbiage. In Pennsylvania they appear as follows :

“All men * * * have certain inherent and inalienable rights among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.”*

“Nor can (the accused) be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land.”†

“Nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made and secured.”‡

These principles were neither novel nor experimental. They have been developed for the just guidance of mankind to an evolution of orderly government. They are a part of the moral necessity which doth “front the Universe with an invincible gesture,” and America may learn from the examples of history from Spain to Russia that no nation can violate them with impunity.

“Our destiny,” said George William Curtis, “is the utmost development of Liberty.”§

SEPARATION OF FUNCTIONS OF GOVERNMENT

Second.—In order to guard these principles American polity provides an important rule for the framework of government, namely, the separation of governmental power into three departments, Legislative, Executive and Judicial. This is not explicitly laid down in the Federal

*Constitution of Pennsylvania, Article I, Section 1.

†Article I, Section 9, Purdon's Digest, page 122.

‡Article I, Section 10, Purdon's Digest, page 128.

§Phi Beta Kappa Oration, 1862.

Constitution, as it has been in some of the State Constitutions,* but the Federal Constitution silently adopts it as evident and preaches it by example. As this principle is now being frequently disregarded to the insecurity of our rights and the decay of the Constitution it demands a little longer treatment.

The distinction between these Departments is elemental in free societies and comes down from Aristotle, the father of politics.†

“All States,” says he, “have three elements, and the good law-giver has to regard what is expedient for each State. When they are well-ordered the State is well-ordered, and as they differ from one another, constitutions differ. What is the element first which deliberates about public affairs; secondly, which is concerned with the magistrates and determines what they should be, over whom they should exercise authority and what should be the mode of electing them; and thirdly, which has judicial power?”

It was to this separation in the Government of England that the framers of our Constitution looked, especially as interpreted in Montesquieu’s “*Spirit of Laws*,” and in Locke, “*Of Civil Government*, Book II, Chaps. 9-13.” The reasons are stated in Montesquieu’s “*Spirit of Laws*,” Book XI, Chap. 6, “*Of the Constitution of England*,” as follows:

“The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man needs not be afraid of another.

*For the original states which had adopted it prior to 1787 see “*Federalist*” No. XLVI.

†Aristotle, *Politics* IV, 14-16, Jowett’s Translation, Vol. I, page 133.

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

“Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.”

Madison, in the Federalist Nos. XLVI and XLVII, discusses this passage, showing that separation cannot and ought not to be absolute, but that the different departments ought to be so far, “connected and blended as to give to each a constitutional control over the others.” He there shows what we have now many examples of, namely, that the danger to the American State is from the Legislative Department.

Enough has been said to define the State contemplated by our Constitution. It is a State where equal and general law protects all alike, where the citizen living in a condition of domestic tranquility (Preamble of Constitution) has no occasion to entertain a mean fear of the malice of his neighbor or of the power of the State, for it is a country free from unreasonable searches and seizures (Fourth Amendment), from arbitrary arrests and excessive fines, from the petty interference of paternalism, and the mortal persecution of autocracy, where the laws are general, certain and known, where a citizen relying in confidence on the maintenance of judicial procedure and speedy and judicial trials, follows his own

vocation in his own way and in his own place as long as he injures no one else; where the free spirit of man is allowed its fullest play, and where liberty and order are secured in their mutual balance. This is the system to which we owe our happiness, and by which our greatness has been achieved. This liberty demands our reverence by the vastness of its ideal, our gratitude for its infinite benefit, our ready pardon for its errors, and above all unflagging and defiant enthusiasm, without which even liberty must die.

DANGER OF PRESENT TENDENCIES

I have insisted on the necessity of separation of government function, because it is in this respect that present tendencies are carrying us far away from the principles of the fathers. The country is now being governed by multitudes of departments and commissions which infringe this law in that *the same men or body of men have the right to make laws, interpret them and enforce them*. The most notorious example of this is, no doubt, the Internal Revenue Department, as it enforces the drastic income tax law. It interprets the law passed by Congress, passes a multitude of regulations which are in effect laws, changes them at pleasure, interprets them at will, almost uniformly against the taxpayer, and then enforces them by distress and heavy penalties. There is really no redress on the part of the subject (for such the former citizen may now be truly called), and the only judicial methods provided are inadequate and can be applied only after the harm is done. No general act applying to the whole country, since the Alien and Sedition laws, has probably done as much to make our citizens fear and dislike their government as the Internal Reve-

nue Act. But the same objection applies in a greater or less extent to many commissions.

The Interstate Commerce Commission is an example of one of the most oppressive of these. It is needless here to mention them all, nor would it be possible except after long study to make a complete record.

The situation as to Federal commissions has been summarized by Hon. A. O. Stanley, of Kentucky, a member of the House of Representatives, in a speech made in Chicago, January 12, 1922:

“In the ownership, operation, or supervision of the industrial and commercial activities of an empire, from telegraphs and telephones, steamships and railroads to the elimination of boll weevil and the setting of a hen, Congress has created 100 different committees and commissions, boards and bureaus, and within 10 years has actually expended the appalling sum of \$3,921,360,167.55, according to the official figures of these departments. If, however, the more dependable estimates of that able and accurate statesman, Senator King, of Utah, are accepted, it reaches the incomprehensible aggregate of \$7,500,000,000.”

There is a similar condition in State administration. The Reorganization Committee found the State administration of Pennsylvania divided into 107 independent agencies, including 8 constitutional officers. These agencies were made up of 25 administrative departments, 2 independent bureaus, 14 independent boards, 2 councils, 12 unattached boards in charge of licensing the various professions, and 42 independent commissions concerned with various matters from art to soldiers' bonus, as well as 10 miscellaneous groups of Boards and Agencies supervising charitable activities. As the laws creating these

commissions and defining the duties of the subjects are voluminous, complicated and difficult to understand, as well as frequently penal in their nature, the business man of the present day moves in a constant maze of perplexity and danger. The Zoning Laws are full of such traps for the unwary and as is the case in all such complicated laws, they will be used by the unscrupulous to the disadvantage of the honest.

Third.—A third principle of American policy is that

THE LEGISLATIVE POWER CANNOT BE DELEGATED

This, according to Locke, is one of the four fundamental bounds which the law of God and nature has set to the legislative power in all forms of government.*

It is the nature of every trust that the discretion conferred on one cannot be transferred to another. The provisions of our written constitutions expressly provide where the legislative power shall reside.†

Now it is true that a certain degree of latitude has been allowed by the legislatures to cities to pass regulative ordinances as, for instance, those imposing restrictions against wooden buildings, as a protection against fire, but in such cases the Legislature has at least exercised its discretion on a certain definite question affecting the life and safety of the citizens; but how different is the case of the Zoning Act. The entire discretion has been passed on to City Council in a mass to determine the use of any property, to classify business, to degrade certain trades into the class of nuisances, to prohibit legitimate

*Locke, Civil Government II, Chap. XI, Edition of 1823, Vol. V, page 423.

†Constitution of U. S. Art. I, Sec. 1, Purdon's Digest, I, 5, and cases cited.

Constitution of Penna. Art. II, Sec. 1, Purdon's Digest, I, 138 and cases cited.

business on one's own land, and in one's own home, irrespective of the manner in which it is conducted, and to grant or withhold licenses for each occupation. Such discretion involves the exercise of truly legislative power to a vast degree, and in arbitrary ways, which may ruin one man and set up another. But observe further, that although Council passes the Ordinance the work of actually dealing with the detailed discretion is handed over to an appointed Commission, separated by two removes from the legislative power. Even the Commission actually transfers the labor to a committee so that in fact a small body of men, thrice removed from the legislative power, without the support of any suffrage, or the responsibility of official oath, by such process as they may choose, either secret or open, are allowed to determine the status and the value of one-half of a million properties, and alter the rights and living conditions of two million people.

Let us contrast with our American principles

THE THEORY OF GOVERNMENT IN GERMANY

Its basis is military authority, unrestrained by any constitutional limitations. I will quote the highest authority:

“The German Empire, situated in the middle of Europe, and insufficiently protected by nature on its frontiers, is and must remain in a military state. And in history strong military states have always required monarchical guidance * * *. What we Germans need cannot be attained by alterations in the sphere of constitutional law * * *. For the most part the dictum of members of Parliament is accepted quite passively by the common herd.”*

*“Imperial Germany,” 1914, Prince von Beulow, 338-341.

We find, therefore, instead of the power of the government being the gift of a free people ascending upward, an imperial law descending downward, a system encouraging title and caste, rigidity instead of freedom, a supreme power which is not to be criticised without *lese majesté*, an idea of the State dominant over all as guardian, father, educator and God. Hegel, in whom is found the principal philosophic spring of modern Socialism in Germany, regards the State as the "eternal and necessary realization of the spirit of man; it is God come down to *us in the likeness of man.*"*

I will quote the analysis of this idea from a competent critic, Professor John A. W. Haas, President of Muhlenberg College, who said, in his Phi Beta Kappa Oration, March 1, 1918, "The peculiar German development has taken the State apart from the immediate interests of the people; it has created a divine organization on earth. Treitsche speaks of the objectively revealed Will of God in the life of the State, 'The State is made a real social personality in a political, legal and moral sense' * * *. Now all idealizations of the State are moral abstractions, but they become dangerous abstractions when men are asked to obey and reverence them * * *. We must be careful, in this age of increasing social tendencies not to allow any social abstraction to become the reality. Wherever that occurs the real ideals are injured, and the people for whom the State exists and who constitute society become the slaves of an abstraction, and an abstraction may become a terrible master."

To the German nation, therefore, a free political development has been impossible. "No people," says von Beulow, "has found it so difficult to attain solid and permanent political institutions," and again, "We are

*See "Philosophy of Political Economy," Bonar, 316-17.

not a political people.” “How can you wonder,” said Ministerial Director Althoff, to the Prince von Beulow, after reciting the enormous achievements of the Germans in other departments, “How can you wonder that we are political asses? There must be a weak point somewhere.”* “A German,” says the Prince in another place (page 154), “rarely applies the methods of modern science to politics, he mostly employs those of the old speculative philosophers. He does not attach importance to confronting nature with open eyes, and to observing what has happened, what is happening, and therefore what can and necessarily will happen again in the future. Rather he grows intent upon finding out how things ought to have developed, and what they ought to have been like for everything to harmonize with his logic, and for the system to come into its own. *Their programmes are not adapted to reality; reality is to adjust itself to the programmes.*”

The victims of such a system must be trained young. It is worth while to glance, for a moment, at a picture drawn by Goethe (1828), showing how the servitude of the German people begins in childhood. After speaking of the respect and freer development enjoyed by children in England, he says “In our own dear Weimar I need only look out at the window to discover how matters stand with us. Lately, when the snow was lying upon the ground, and my neighbor’s children were trying their little sledges in the street, the police was immediately at hand, and I saw the poor little things fly as quickly as they could. Now, when the spring sun tempts them from the houses, and they would like to play with their companions before the door, I see them always

*Imperial Germany, 127, 128, 131. Althoff spoke in jest; but the world fully agrees with him.

constrained, as if they were not safe, and feared the approach of some despot of the police. Not a boy may crack a whip, or sing or shout; the police is immediately at hand to forbid it. This has the effect with us all of taming youth prematurely, and of driving out all originality and all wildness, so that in the end nothing remains but the Philistine.’’*

From this short review we see that German municipal policy is based on absolutist doctrine and autocratic practice in both nation and city, it is informed by a subtle, pervasive and anti-Christian philosophy, encouraged by civic tradition and imposed on a peculiarly docile and subservient population.

Let us not flatter ourselves that this “terrible master” may stretch his sceptre only over those who kneel at the foot of a throne. The tyranny of the majority operating in a legislative hall may grind a supposedly free people with oppressive laws, more hopelessly than in a monarchical country, for with the mob there is but fitful clemency and no appeal. The autocracy of the old world was denominated a “despotism tempered by assassination,” that of the socialistic world if consummated will be a despotism tempered by bribery;† we have had a sort of foretaste of this in the enforcement of the Eighteenth Amendment.

DANGER OF THE TERM “POLICE POWER”

To the unsophisticated mind to state the principles formerly dominant in American government and then to state the principles of Zoning is to show their inconsistency. The advocates of Zoning, however, allege that such a policy is by the decisions allowable under the police

*Eckermann & Soret, *Conversations of Goethe*, Vol. II, page 59.

†“Mitigated by tips” was the expression of Coventry Patmore.

power, and under the police power they endeavor to group not only whatever is in the interest of public peace, health, morals or safety, but, as they say, of the general welfare.

Now it is true that the Legislatures of the States have gone very far in passing acts supposed to be for the general welfare of the people and that the Supreme Court has in many cases refused to hold such acts unconstitutional on the ground that presumptively the Legislature was the proper judge of what was for the general welfare.

The advocates of Zoning go a step further and argue that because the Supreme Court has not declared certain acts unconstitutional therefore they must be beneficial, and then they add that, the necessary destruction of value which they cause, being under the police power, it is not requisite that the owner be compensated.

THE CASUISTRY OF SOCIALISM

The zoners utterly fail to distinguish between taking property under the power of eminent domain, and under the police power. The reason is that the powers are, in fact, indistinguishable, although the processes are different. "What then is the line of difference between these powers?" asks Mr. Frank Backus Williams, the legal protagonist of Zoning.* "The analysis of the cases," he answers, "*seems to show that it is largely one of degree.*" This is the same as saying that they are largely the same in kind, but injuries of the same kind are entitled to the same kind of redress. The distinction is, therefore, one of terms, and not of right, and justice is made to depend altogether on the term you use, and not on the wrong you do; and so the police power

*The Law of City Planning and Zoning (1922), page 25.

is made "a higher law than the Constitution," for the Constitution, like the Eighth Commandment, says nothing about powers, but "Thou shalt not take." What a hocus-pocus of law, whose seat in the days of Hooker was in the bosom of God!

PROTECTION OF THE POLICE POWER CANNOT BE WAIVED

Now it is very evident from this that if any and all property can be taken for the good of the public and the act under which it is taken denominated an exercise of the police power, that there is no such thing as security of property left. Every honest mind has an immediate and persistent doubt as to whether such an act as a Zoning Ordinance is really an exercise of police power, and that it is not in fact is shown with sufficient certainty by the conditions which are included in many of the ordinances, namely: *that the enforcement of the power is made to depend upon the consent of some of the property owners*. Many of the ordinances provide that a building obnoxious thereto can be erected in certain localities with the assent of a certain proportion of the property owners; the Philadelphia ordinance provided that petitions for change should be made in writing to the Commission by the registered owners of more than one-half of the frontage between two streets, but that if a protest was made in writing by one-third of the registered owners the appeal should not be granted except by a vote of three-fourths of the Zoning Commission. It is evident that if the restriction is necessary for the safety or health or even the general welfare of the body politic, it cannot be subject to the discretion of an uncertain number of individual citizens. The protection of the police power in its very nature cannot be waived. These provisions to the candid mind stamp the Zoning Ordinance not as an exercise of

police power but as an act regulating property rights. In fact, its advocates maintain the Zoning Ordinance on the ground that it stabilizes the value of property.*

CONSTITUTIONAL MORALITY

Long ago, Grote, the historian of Greece, introduced the term, "constitutional morality,"† by which he meant that self-restraint, which he describes as, "the indispensable condition of a government at once free and peaceable." Where the legislator votes for an act unconstitutional in spirit, either on the supposition that it may slip through the test of the courts, or on the ground that he will leave it to the courts to determine that it is unconstitutional, if it be so, he is guilty of an offence against the spirit of the constitution.

Solicitor General Beck has drawn a useful distinction between acts which are juridically unconstitutional and those which are politically anti-constitutional.

The fact that Zoning is anti-constitutional in this sense is readily inferred from the confessions of the professional zoners themselves. There has been created a Division of Building and Housing as part of the Federal Department of Commerce. What that Department has constitutionally to do with municipal regulation is nothing. It is created under the clause relating to Interstate Commerce, and Zoning is neither Interstate nor Commerce. An Advisory Committee on Zoning has been appointed, made up principally of professionals. It has issued a form of a State Zoning Enabling Act (January, 1923). The notes accompanying this draft show the

*See an able article "Law Making by Property Owners," by Professor Howard Lee McBain, of Columbia University, in the Political Science Quarterly of December, 1921.

†"History of Greece III," 131.

greatest antipathy to the limitations of the Constitution and a high degree of ingenuity in avoiding them. For instance, the Committee recommends that such an Enabling Act contain no declaration that the act is not retroactive. The explanatory notes say:

“Some laws contain a provision to the effect that, ‘the powers by this Act conferred shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted.’ While the almost universal practice is to make Zoning Ordinances *non-retroactive*, it is recognized that there may arise local conditions of a peculiar character, that make it necessary and desirable to deal with some isolated case by means of a retroactive provision affecting that case only. For this reason it does not seem wise to debar the local legislative body from dealing with such a situation.”

They have also invented the term of “Interim Zoning” which they apply to an ordinance providing that, “whenever three-fourths of the houses in a block are residential, then no new business structure or factory can be built in the block.” The notes continue as follows:

“The reason it is objectionable is because it is too general, not sufficiently adapted to the particular need of each street and therefore likely to be arbitrary in many cases. In such case, if a new house is built or an old one destroyed, the legal protection of the district may be altered. In this sense the district is a ‘traveling zone.’ As such, a district has no stability, and as the police power may be differently applied according to the acts of property owners, it is not looked upon with favor by the courts.”

“For,” the pamphlet continues, “a provision is void that a non-conforming building can be built if a majority consents in writing. The ordinance should always be phrased so as to prohibit the non-conforming use unless the desired majority files written consent with the officials.”*

It is further recommended that one of the purposes of the act be not stated as “public health” but only “health,” because “public health” narrows the application.

It is further recommended that the regulations control density of population. This, it is said, is comparatively new in zoning practice, but highly desirable. For this reason the general phrase, “density of population” is regarded as a better phrase than, “power to limit the number of people to the acre” as this is only one method of limiting the density. “It may be more desirable to limit the number of families to the acre,” etc. It is believed by the zoners that with proper restriction the provision will make possible the creation of one family residence districts.

It is further recommended that the power to regulate be not only given for the specified purposes but for “other purposes,” this having the advantage, as they say, of being a “catch phrase” and will “include every use.” So it is further recommended that the power be given to establish set-back building lines and even to regulate and restrict repairs as well as the use of buildings.

It is further recommended in the same circular that the remedies be drastic so that the authorities, “may sue the responsible person for a penalty in a civil suit; they may arrest the offender and put him in jail; they may

*See this distinction discussed by Professor McBain in the article above alluded to.

stop the work in the case of a new building, and prevent its going on; they may prevent the occupancy of a building and keep it vacant until such time as the conditions complained of are remedied; they can evict the occupants of a building when the conditions are contrary to law, and prevent its reoccupancy until the conditions have been cured. All of these things the local authorities should be given power to do if Zoning laws are to be effective.” This bureaucratic program is issued by a division of the Department of Commerce.

THE CONSTITUTION VAIN WITHOUT LEGISLATIVE RESTRAINT

The final result of the present tendency must fill one with alarm for if the constitution is powerless against the insidious argument of the police power, the growing possibilities of the taxing power, the continuous nibbling of the bureaucratic tendency, it is uncertain how effective its hollow framework may be.

James Russell Lowell said in his address, “The Independent in Politics” (1888):

“The late M. Guizot once asked me ‘how long I thought our republic would endure.’ I replied, ‘So long as the ideas of the men who founded it continue dominant’ and he assented.”*

Washington understood the danger of combining the various branches of government upon which I have commented. Writing in 1788, he said, “These * * * powers are so distributed among the legislative executive and judicial branches, into which the government is arranged that it can never be in danger of degenerating

*Lowell's Works, VI, 207.

into a monarchy, an oligarchy, or an aristocracy, or any other despotic or oppressive form so long as there shall remain any virtue in the body of the people.'''* By virtue he undoubtedly meant that mental, moral and political self-restraint without which constitutionalism is an empty name.

*Washington to Lafayette. Writings of Washington, Ford. XI. 219.

APPENDIX

ANALYSIS OF THE PHILADELPHIA ORDINANCE

The Ordinance divided the City into three kinds of districts, designated as Use Districts, Height Districts and Area Districts, located and bounded as shown on the District Maps of the City made by the Zoning Commission, which maps, sixty-three in number, were made part of the Ordinance. It provided that every building erected or located and every use within a building or accessory thereto should be in conformity with the provisions of the ordinance, and that any existing building or use not in conformity therewith should be considered as non-conforming.

USE DISTRICTS

Use Districts were of four kinds:

First.—Residential Districts for dwellings.

Second.—Commercial Districts for business and trades.

Third.—Industrial Districts.

Fourth.—Least Restricted Districts.

It provided that only such uses or accessory uses as were defined in the said Ordinance should be permitted within the several districts. In the Residential Districts there were only allowed dwellings and as accessory uses thereto, professional offices, private garages and private stables. It was provided that buildings for educational, philanthropic, recreational and religious uses which are in no way objectionable or detrimental to the residential character of the district would be permitted, subject to special location permits to be granted by the Zoning Com-

mission after public hearing. The following uses were to be allowed:

“Club houses, educational buildings, hospitals and sanitariums, nurseries, green houses, places of worship, recreation buildings, libraries, art galleries, public museums, philanthropic and eleemosynary institutions, and necessary public utilities, including community heating and lighting plants, and aviation fields.”

Residential Districts were to comprise all lots and buildings fronting on a residential street, and all land not designated on the Use Maps as located in the other districts.

COMMERCIAL DISTRICTS

Commercial Districts were designated for commerce, general business, and the sale of commodities and accessory uses, including light industry, provided that such accessory use was not detrimental. The uses permitted in the Residential Districts were permitted in Commercial Districts, but other uses were prohibited.

Special Location Permits issued by the Commission might permit the erection or maintenance of the following structures in a Commercial District:

“Accessory uses

Advertising structures

Community heating plants

Freight transportation and storage buildings

Power-generating plants and electric sub-stations

Public garages, community garages and public stables.”

A commercial use within a building fronting on a commercial street located on a corner lot approximately rectangular might extend such use on an intersecting

residential street to a depth not exceeding 100 feet from the corner. The commercial use of a building located on a triangular or irregular lot where commercial and residential streets intersect should not extend along the residential street more than 150 feet beyond the intersection, but such use should not extend beyond the point where the intersecting streets are 200 feet apart.

INDUSTRIAL DISTRICTS

Industrial Districts were designated primarily for industries, manufactories and trades, including all processes employing power generated by electric, steam, gas, etc., provided that any such use is not detrimental, etc.

The uses permitted in Commercial Districts were permitted in Industrial Districts, but the uses permitted in the Least Restricted Districts were prohibited.

LEAST RESTRICTED DISTRICTS

The Least Restricted Districts were designated for buildings and uses without restriction as to kind, except as defined by other laws or ordinances, and include a long list of more obnoxious manufactures and trades from blast furnaces to stock yards. In the Least Restricted District no dwelling was permitted other than for the use of watchmen and caretakers.

The Ordinance as drawn involved an attempt to catalogue all possible uses but it was provided that any desired use not specifically mentioned should be assigned to such Use District as may be designated by the Zoning Commission.

Non-conforming buildings were to be continued provided that no addition thereto should be permitted exceeding 25 per cent. of the area of the building at the time of the approval of the Ordinance, and all such exten-

sions should be in conformity with the provisions of the Ordinance and no subsequent additions should be permitted.

SOME EFFECTS OF THE USE RESTRICTIONS

Before passing to the Height and Area Regulations, it may be well to observe:

First.—That in the Residential District no shop or store of any kind was allowed unless already established. If established, it became a permanent monopoly, because no further competition was possible in that particular district.

For this reason the value which any other property in the district would have for such a prospective purpose, would be shifted to the property already so occupied and is represented in the monopolistic value enjoyed by the owner.

Second.—Any one living in a Residential District must go to the nearest Commercial District for supplies of all kinds, unless obtainable at such a monopolistic shop. The possible convenience of having supplies near the dwellings was not considered sufficient to render a shop tolerable. An ordinary shop, no matter what its stock in trade, is therefore under the terms of the Ordinance relegated in the Residence District to the position of a nuisance.

Third.—Under the Ordinance as drawn it would be quite impossible to conduct any sort of business in one's residence; even an educational use could only be established in one's dwelling by obtaining a Special Local Location Permit from the Zoning Commission, and if one wished to conduct a cobbler's business or to use for business purposes a hand loom or a small printing press in his residence, it would not be allowable.

Fourth.—It is also to be observed that a public utility could only be established in a residential section by permission of the Zoning Commission after public hearing. It would be therefore quite impossible for a public utility to establish a plant without first giving publicity to its plans, which would effectually prevent its purchasing any property at reasonable cost.

Fifth.—If any one wished to start a new kind of business he might first have to have the business allocated to a particular district by the Zoning Commission, unless he was willing to locate in the Least Restricted District. He might, therefore, not be able to buy a property for the purpose until he knew where he would be allowed to locate. The result of this might well be that he would not locate in the City at all.

Sixth.—Under the provision that there shall be no dwellings in the Least Restricted District, any owner whose property is included in such a district is prevented from developing it unless he chooses to embark in business in the midst of obnoxious neighbors. The depressing effect where a large tract is so degraded is obvious.

LICENSES FOR EVERY OCCUPATION

Probably it was not at first observed by the Zoning enthusiasts that the Ordinance would involve a license to teach school even in one's own home. This is obnoxious to American policy, but normal in Prussia where all education is under the control of the State, and where even a private tutor must be licensed.*

*Collier, Germany and Germans, page 283.

HEIGHT DISTRICTS

The City was divided into various Districts designated as:

1	Times	Height	District
1½	“	“	“
2	“	“	“
2½	“	“	“
3	“	“	“

In this peculiar nomenclature the terms denote the number of times which the maximum height of any building at the street line bears to the width of the street; that is to say, in a 1 Times Height District on a 30 feet street you may build 30 feet high, in a 2 Times Height District 60 feet high. There is a provision allowing a unit of increase for each foot of setback which also varies in the different districts. If your building line sets back one foot in the 1 Times Height District you can build 1 foot higher, in the 2 Times Height District 2 feet higher, in the 3 Times Height District 3 feet higher. This allowance in the case of a setback from the rear is doubled. This makes a very complicated table, requiring considerable study to determine what one's rights are on any particular lot. There was provided also a maximum building height limit in the different districts, as follows:

1	Times	Height	District	45 feet
1½	“	“	“	65 “
2	“	“	“	85 “
2½	“	“	“	125 “
3	“	“	“	150 “

If a building is located at the intersection of two streets, the height limit allowed for the frontage abutting on the wider street governs the height limit and setback along the other frontage for a distance of 100 feet.

Before passing to the Area regulations, it may be well to consider the effects of these restrictions.

SOME EFFECTS OF THE HEIGHT RESTRICTIONS

First.—The height limitation is much stricter than in New York, in that it provides an absolute limitation for each District. As this limitation is fixed according to the width of the street, it follows that a lot with more than one front may be subject to different height limits on different fronts of the lot, which precludes an economical and symmetrical development.

Second.—The antipathy to high buildings displayed by the Ordinance is on the assumption that they are a detriment, whereas for business they are a necessity and for health they are the most sanitary of all buildings.*

Third.—It is also evident that where an addition is made to a building not now conforming in height, it may be impossible to conform the new structure to the older building.

Fourth.—It is also evident that the value of a piece of real estate which has been bought upon the supposition that it could be improved with a high building is immensely depreciated and that as in the case of a monopoly of a store, the value taken away from the unimproved lot is added to the higher buildings already erected.

Fifth.—It is also to be observed that in the Height as in the Area District, the lines determining the areas do not run on streets, but run back of them and may bisect a particular property, so that a particular lot may fall in two Area Districts or in two Height Districts.

*See this question discussed in the memorial addressed to council January 1922.

AREA DISTRICTS

In a similar way, the City is divided into five Area Districts, in each of which the area of a lot which may be incumbered by buildings is expressed in percentage of the whole as follows:

“A District		30	per cent.
B	“	50	“ “
C	“	70	“ “
D	“	90	“ “
E	“	95	“ “ ”

The regulation as to area is accompanied with a complicated table showing the mandatory requirements for incumbered and unincumbered areas in the different classes, depending on the location of the unincumbered area in front yards, side yards or back yards and depending also on the character of the building, whether dwelling or not.

Combining these various regulations, we find in a Residential District that a man owning property containing 10 acres will be allowed to build on only 30 per cent.* of his lot; if he builds on the property line he can only build to a height of 45 feet, and he would be unable to conduct the simplest and most harmless kind of business. Home industry such as has been heralded by another type of reformers, as a hoped-for result of transmission of electric current, is put out of the question.

In order to enforce the complicated machinery of the Ordinance, it requires that Zoning Certificates shall be secured from the Zoning Division prior to the construction or alteration of any building, the Zoning Certificate to be granted or refused within fifteen days after the filing of such application.

*Increased to thirty-five in the ordinance now proposed for West Philadelphia.

Occupancy Permits are to be required for every building in use other than residential in the three other Districts and for every non-conforming use within the Residential District, and for each subsequent change of use in any district. Occupancy Permits from the Zoning Division are to be required within one year from the date of the Ordinance.

It was stated when the Ordinance was pending that the number of permits immediately required was 40,000.

PENALTIES

As is usual in regulations of this kind, the Ordinance is highly penal. Violation persisted in for more than thirty days after notice from the Zoning Division subjects to a penalty of \$75.00 for every violation, and a further penalty of \$50.00 for every period of thirty days after the imposition of the first penalty.

For the purpose of carrying out the Ordinance, there is organized a Zoning Division as part of the Bureau of Surveys, Department of Public Works, which is to issue the certificates and permits.

Petitions for changes in the location of the districts are to be heard by the Zoning Commission, which with the approval of Council, may make such changes as are deemed desirable and necessary, petitions for changes to be made to the Commission by the registered owners of more than one-half of the block frontage between two main streets. If a protest is made by at least one-third of the registered owners, "such appeal" shall not be granted except by vote of three-fourths of the entire Zoning Commission, appeals from the issuance or refusal of certificates or permits to be decided by the Zoning Commission. The Zoning Division and the Zoning Commission are each

to make such rules and regulations as may be deemed necessary.

It will be observed that no revision of any of the Districts can be made by the Zoning Commission without the approval of Council.

WHAT HAPPENED TO THE ORDINANCE

This Ordinance was presented to Council for passage without any report in writing showing its necessity or justifying its principles or the particular limitation of areas. It was immediately evident that the damage threatened to property owners and business interest was very great and opposition developed.*

After hearings before the Zoning Committee of Council, that Committee by resolution eliminated from the operation of the Ordinance all of the old City of Philadelphia, from Vine to South and from River to River. This action practically killed the Ordinance, and no further attempt has been made to pass it, because, as I suppose, it was thought that to cut out the central part of the City would render the Ordinance if passed in that shape unconstitutional. The thanks of the City are due to the foresight and independence of those councilmen who secured its defeat. The building of numerous important buildings begun since then, eight or ten in number, is sufficient evidence that they were right. The Ordinance has now been partially resurrected so as to apply to West Philadelphia only.

The suggestion as to the necessity of neighborhood shops has been met in the new Ordinance by including a provision that a corner store may be built in Residential

*Copies of memorandum submitted on behalf of Fidelity Trust Company to the Committee of Council, analysing the ordinance and protesting against its passage, can be had by addressing the Company.

Districts except in Class A and Class B Area Districts, which may be classed as suburban (page 6). Why a store should be allowed on the corner and not elsewhere the Commission has not so far as I know explained. The result of such a discrimination is to give the corner an additional value over the other lots, and therefore as in the case of the established "non-conforming" store to transfer a portion of the value of one man's property to another.

The new Ordinance has also introduced in the Residential Districts uses described as "Home occupations." What is meant by this term, of course, cannot be determined until the Zoning Commission rules on it. It can only mean such occupations as *the Commission may from time to time think* ought to be carried on at home.

With the new Ordinance for West Philadelphia there are presented three new maps making certain changes in the allotment of territory to the different districts. The section South of Penrose Avenue has been made Industrial instead of Residential. The half block on the side of the Philadelphia & Reading Railroad tracks between 74th Street and 91st Street has been made Industrial instead of Residential. This is over a mile in length; whereas property on the line of the P. W. & B. Railroad from 61st to 73d Streets and on Elmwood Avenue, between 68th Street and 70th, which latter was formerly Industrial has been made Residential, although on the line of the railroad. It is difficult for anyone to see why if a railroad is to determine that property is to be industrial, the P. B. & W. Railroad would not have the same effect as the Philadelphia & Reading.

There are in the map some fifteen or twenty other changes for which the Commission no doubt have their reasons which are not evident to others. In general, the

height restriction has been made a little more liberal and some of the area districts have been changed to more liberal allowance and some have been more strictly limited.

These changes in the original Ordinance are evidence of the great power that will be vested in the Commission and Council should all of the property within the City be placed under their control by a Zoning Ordinance.



“The accusation which the historian is bound to bring against every government which has hitherto existed is, that it has overstepped its proper functions, and at each step has done incalculable harm. The love of exercising power has been found so universal that no class of men who have possessed authority have been able to avoid abusing it.”

***Buckle, “History of Civilization,”
(1857) Vol. 1, Chap. V. p. 280***